Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1121

AMERICAN BROADCASTING COMPANIES, INC., CBS INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioners,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHARLES G. BAKALY,
611 West Sixth Street,
Los Angeles, Calif. 90017,

Attorney for Petitioners:
American Broadcasting Companies, Inc., CBS Inc., and National Broadcasting Company, Inc.

Of Counsel:
O'MELVENY & MYERS,
RICHARD N. FISHER,
GORDON E. KRISCHER.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

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No. .....

AMERICAN BROADCASTING COMPANIES, INC., CBS INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioners,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which denied enforcement of an order of the National Labor Relations Board (hereinafter "Board").*

Opinions Below.

The decision and recommended order of the administrative law judge is set forth in Appendix A hereto. The decision and order of the Board, reported at

*Petitioners are informed that the Board will file a petition for a writ of certiorari to review the same judgment on or before February 22, 1977.

217 NLRB No. 159, is set forth in Appendix B hereto. The decision of a divided panel of the court of appeals which denied enforcement to the Board's order, with Judge Moore dissenting, is not yet reported and is set forth in Appendix C hereto.

Jurisdiction.

The judgment of the court of appeals was entered on November 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and in accordance with Supreme Court Rule 19.

Question Presented.

Does a labor union violate § 8(b)(1)(B) of the Labor Management Relations Act, as amended, by disciplining through substantial fines and blacklisting those supervisor members and managerial members who perform solely their normal supervisory and managerial duties including grievance adjusting and collective bargaining during a strike by said union against their employer?

Statute Involved.

Section 8(b)(1)(B) of the Labor Management Relations Act of 1947, as amended, (hereinafter "Act") 29 U.S.C. § 158(b)(1)(B) provides:

> "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . ."

Statement of Case.

In March of 1973, Respondent, Writers Guild of America, West, Inc. (hereinafter "Guild") commenced a four month economic strike against Petitioners (hereinafter the "Networks") and others.* In anticipation of and during the course of this strike, the Guild attempted, by means of pervasive and widely-publicized written and oral threats of fines and blacklisting, to coerce various supervisory and management personnel who were members of the Guild to cease performing their regular supervisory and managerial functions, including grievance adjusting and collective bargaining during the strike. These supervisory and management personnel are hereafter called "supervisor-members." Prior to and during the strike, the Guild prohibited supervisor-members from resigning their membership in the Guild.

During the course of the strike supervisor-members were required by the Networks to cross Guild picket lines and otherwise to perform their normal supervisory and managerial duties, which they did. These duties included grievance adjusting and actual collective bargaining. The supervisor-members were not members of any bargaining unit represented by the Guild nor were they covered by the collective bargaining agreement between the Networks and the Guild which expired

*The Guild also struck employer-members of the Association of Motion Picture and Television Producers, Inc. ("Association") and various independent film production companies. The Association was one of the charging parties before the Board and intervened in the enforcement proceedings before the court of appeals seeking enforcement of the Board's order. Petitioners are informed that the Association will file a petition for a writ of certiorari to review the judgment of the court of appeals on or before February 22, 1977.

prior to the strike. During the strike, supervisor-members did not perform any rank-and-file struck work. The Guild's threats against the supervisor-members were followed by disciplinary trials and the imposition of substantial fines.

Petitioners filed unfair labor practice charges alleging violations by the Guild of § 8(b)(1)(B) of the Act. Complaints issued against the Guild alleging violations of § 8(b)(1)(B) and a hearing was held before an administrative law judge on said complaints. He determined that when the Guild prevented or sought to prevent the Networks' supervisor-members from performing work in their managerial and supervisory capacities during the strike, the Guild restrained and coerced the Networks in the selection of their representatives for the purpose of collective bargaining and adjusting grievances in violation of § 8(b)(1)(B) of the Act. (App. A at 46-48). In reaching this conclusion, he distinguished *Florida Power & Light Co. v. I.B.E.W., Local 641*, 417 U.S. 790 (1974) where a bare majority of this Court held that "unions did not violate § 8(b)(1)(B) of the Act when they disciplined their supervisor-members for *performing rank-and-file struck work*." 417 U.S. at 813. [Emphasis supplied.]

The Board adopted the findings of fact and decision of the administrative law judge and additionally held that the Guild's threats of discipline also violated § 8(b)(1)(B). (App. B at 3). The Board's decision does not elaborate its reasoning but it is quite clear that the Board did not regard *Florida Power & Light, supra,*

as controlling. Rather, the Board relied on and cited two subsequent Board decisions to sustain its finding of § (8)(1)(B) violations in the instant case: *New York Typographical Union No. 6*, 206 N.L.R.B. 294 (1973) reconsidered and affirmed in light of *Florida Power & Light Co.*, 216 N.L.R.B. 896 (1975); *Chicago Typographical Union No. 16*, 216 N.L.R.B. 903 (1975), *enforced*, No. 75-1320 (D.C. Cir., June 21, 1976); *petition for cert. filed*, 45 U.S.L.W. 3385 (U.S. Nov. 16, 1976) (No. 76-688). These two Board decisions are set forth respectively in Appendices D and E hereto.

In *Florida Power & Light*, the Court had stated:

> "The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of 8(b)(1)(B) *only when that discipline may adversely affect* that supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." 417 U.S. at 804-05. [Emphasis supplied.]

The Board interpreted the Court's language as follows:

> "We believe that the adverse future effect which the Supreme Court referred to as violative in Florida Power is as likely to occur, regardless of a union's professed reasons or intent, if a supervisor-member is disciplined after having performed only his normal supervisory duties or if he is disciplined after having engaged in contract interpretation. In the latter case it is the supervisor's future manner of contract interpretation

which is likely to be influenced and in the former case it is the supervisor's actual future performance of supervisory duties, including grievance adjustment or collective bargaining, which is likely to be influenced. In either case the employer has been restrained in the selection of his 8(b)(1)(B) representative." 216 N.L.R.B. at 897, App. D at 6 (Footnote omitted). See also App. E at 4-8.

Board Member Fanning dissented in the instant case (App. B at 5) for the reasons set forth in his dissent in *New York Typographical Union No. 6, supra* (App. D at 7-20), to wit: that in light of *Florida Power & Light*, § 8(b)(1)(B) must be read to permit unions to discipline supervisor-members for working during a strike against their employer despite the fact that they perform no rank-and-file bargaining unit work but only their normal supervisory duties, and despite the fact that such normal duties include grievance adjusting and collective bargaining. In Fanning's view, the nature of the work actually performed by supervisor-members, whether rank-and-file bargaining unit work or regular supervisory duties, including grievance adjusting and collective bargaining, is legally irrelevant to adjudication of an alleged violation of § 8(b)(1)(B).

In the instant case the Board's petition for enforcement and the Networks' petition for review of the Board's order were filed with the court of appeals pursuant to § 10(e) and § 10(f) of the Act, 29 U.S.C. §§ 160(e), (f), respectively. A divided panel of the court of appeals denied enforcement of the Board's order substantially for the reasons set forth in Member Fanning's dissent. Notwithstanding the facts as found by

the Board, the court held "that the Board, as a matter of law incorrectly applied Section 8(b)(1)(B) to the instant case. . . ." (App. C at 3) Dissenting, Judge Moore would have enforced the Board's order because he found that the majority's reliance on *Florida Power & Light* was misplaced in that this Court "made it clear [therein] that there is a definite cleavage between supervisory work and 'rank-and-file' work . . .," and because "[t]he Court of Appeals should not usurp the function of the ALJ and Board unless there is complete absence of evidence to support its findings." (App. C at 6).

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Is in Direct Conflict With Decisions of the Seventh and District of Columbia Circuits Which Hold That Union Discipline of Supervisor-Members for Performing Supervisory Duties During a Strike Violates § 8(b)(1)(B) of the Act.

In *Florida Power & Light Co. v. I.B.E.W., Local 641, supra,* supervisor-members who crossed their union's picket lines during a strike to perform struck bargaining unit work were disciplined by their union. The Court framed a narrow question for decision:

> ". . . whether the unions committed unfair labor practices under § 8(b)(1)(B) when they disciplined their supervisor-members for crossing the picket lines and performing rank-and-file struck work during lawful economic strikes against the companies." 417 U.S. at 792.

It reached an appropriately narrow holding:

> "[W]e hold that the respondent unions did not violate § 8(b)(1)(B) of the Act when they disciplined their supervisor-members for performing rank-and-file struck work." *Id.* at 813.

Subsequent to *Florida Power & Light,* the Seventh and District of Columbia Circuits have reviewed and enforced Board orders finding § 8(b)(1)(B) violations where unions disciplined supervisor-members who performed their normal supervisory duties against their unions' wishes. Both courts regard the nature of the work performed by the supervisor-members as being the key legal issue in § 8(b)(1)(B) adjudications.

In *Wisconsin River Valley District Council of Carpenters v. NLRB,* 532 F.2d 47 (7th Cir., 1976),

the court upheld the Board in its determination that union discipline of supervisor-members for performance of their supervisory duties can coerce and restrain their employer in selecting them as grievance adjusters or collective bargainers. Such discipline can and did, as the Board so found, adversely affect the supervisor's conduct of his § 8(b)(1)(B) duties. The Seventh Circuit stated:

> ". . . Florida Power and its antecedents teach that the focus of a Section 8(b)(1)(B) inquiry rests on the nature of the supervisors' duties when discipline is imposed. Where supervisors cross picket lines to perform regular supervisory duties, union discipline violates Section 8(b)(1)(B) since it tends to deprive the employer of its supervisors' services—including their § 8(b)(1)(B) services—and because the supervisors would reasonably anticipate that union discipline would also be imposed if future performance of their § 8(b)(1)(B) functions did not meet with union approval." 532 F.2d at 53.

Similarly, in *Chicago Typographical Union, No. 16 v. NLRB,* No. 75-1320 (D.C. Cir., June 21, 1976), *petition for cert. filed,* 45 U.S.L.W. 3385 (U.S. Nov. 16, 1976) (No. 76-688) the District of Columbia Circuit enforced the Board's order on the basis of the Board's opinion reported at 216 N.L.R.B. 903 (1975) (App. E). In *Chicago Typographical Union, No. 16,* the union disciplined supervisor-members who worked behind picket lines during a lawful strike but performed supervisory duties including grievance adjusting. The court thus sustained the

Board's finding of a violation of § 8(b)(1)(B) and the Board's interpretation of *Florida Power & Light*.

By affirming the Board's decisions, the Seventh and District of Columbia Circuits have clearly and unmistakably rejected Member Fanning's interpretation of *Florida Power & Light* to the effect that the nature of the work actually performed by supervisor-members who are disciplined for working in violation of union orders is irrelevant to the determination of a § 8(b)(1)(B) violation. The Second Circuit's decision herein by adopting Member Fanning's dissent as a matter of law is thus directly in conflict.

2. The Decision Below Raises an Important Question of Federal Labor Law Which Should Be Settled by This Court.

The question presented has not been decided by this Court and until it is it will remain an open and persistently recurring question with which both sides to labor disputes must contend and somehow govern their conduct.

The Court in *Florida Power & Light* reached the narrow holding that "unions did not violate § 8(b)(1)(B) . . . when they disciplined their supervisor-members for performing *rank-and-file struck work*." 417 U.S. at 813. [Emphasis supplied]. In his dissenting opinion in *Florida Power & Light*, joined by three other Justices, Justice White stated: "I do not read the Court to say that § 8(b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-

and-file work, during a labor dispute." 417 U.S. at 815, n.2. Therefore, it is clear that the question presented herein has not been decided by this Court.

The circumstances under which the question arises is the common, everyday economic strike wherein some supervisors of the struck employer may also be members of the striking union. The striking union, in order to maintain solidarity and to increase its economic pressure, fines members who work during the strike, and now, under the principle established by this case, will no doubt fine supervisor-members who, even though they work, do not perform bargaining unit work. With good reason, the ability of a union legally to levy fines and discipline its members has in the past been and continues to be an issue in the developing federal labor law which the Court regards as a most important one.* Such ability is directly related to the strength of a union's solidarity and its economic muscle during the traditional economic strike. However, until the instant case this legal ability has been limited to fining and disciplining those members who are either in the bargaining unit or who, even though supervisor-members, cross picket lines solely to perform struck bargaining unit work.

The instant case establishes a new and heretofore unexpected and previously unsought economic weap-

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*See *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967); *Scofield v. NLRB*, 394 U.S. 423 (1969); *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233 (1971); *NLRB v. Granite State Joint Board, Textile Workers Local 1029*, 409 U.S. 213 (1972); *Booster Lodge No. 405, I.A.M. v. NLRB*, 412 U.S. 84 (1973); *NLRB v. Boeing Co.*, 412 U.S. 67 (1973); *Florida Power & Light, supra.*

on.* Under its principle, workers are allowed to tell their supervisors and managers who may retain some form of union membership, "Now that we are on strike, you can't work either. If you continue working, by hiring and firing and otherwise performing your normal supervisory and managerial duties which include grievance adjusting and collective bargaining, you will receive a substantial fine." It is submitted that such a dramatic change in the traditional economic weapons available to unions is one not contemplated by the Act or by federal labor policy.

The clear distinction between rank-and-file work and normal supervisory duties which is strongly indicated by the Court's narrow holding in *Florida Power & Light, supra,* is firmly rooted in articulated federal labor policy and is founded upon the traditional and well accepted conduct of parties to labor disputes. The Board, management and labor thus require guidance from this Court as to whether and to what degree the nature of the work performed by supervisor-members during a strike remains legally relevant. The important question presented herein concerning the legitimacy as an economic weapon of union fines against supervisor-members for performing their normal supervisory duties should be decided by this Court.

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*Indeed, the unions involved in *Florida Power & Light, supra,* fined *only* those supervisor-members who performed bargaining unit work, 417 U.S. at 798, and conceded that supervisors who cross picket lines to perform supervisory duties are immune from discipline. *I.B.E.W., Local 134 v. NLRB,* 487 F.2d 1143, 1157 (D.C. Cir. 1973) (opinion on rehearing *en banc*).

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES G. BAKALY,

Attorney for Petitioners:
American Broadcasting Companies, Inc., CBS Inc., and National Broadcasting Company, Inc.

Of Counsel:
O'MELVENY & MYERS,
RICHARD N. FISHER,
GORDON E. KRISCHER.

February 11, 1977.

APPENDIX

APPENDIX A.

Decision.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Writers Guild of America, West, Inc. and Association of Motion Picture and Television Producers, Inc.	Case No. 31-CB-1203-2
Writers Guild of America, West, Inc. and American Broadcasting Companies, Inc. Columbia Broadcasting System, Inc. National Broadcasting Company, Inc.	Case No. 31-CB-1223
Writers Guild of America, West, Inc. and Association of Motion Picture and Television Producers, Inc.	Case No. 31-CB-1316
Writers Guild of America, West, Inc. and American Broadcasting Companies, Inc. Columbia Broadcasting System, Inc. National Broadcasting Company, Inc.	Case No. 31-CB-1313

Writers Guild of America, West, Inc.	)	
	)	Case No.
and	)	31-CB-1355
QM Productions	)	

Philip R. LeVine, Esq., for the General Counsel.

Charles K. Hackler, Esq., and *Gerald Goldman, Esq.* (*Levy, VanBourg & Hackler*), and *John A. Mendonsa, Esq.*, Los Angeles, Calif., for the Respondent.

Harry J. Keaton, Esq. (*Mitchell, Silberberg & Knupp; Andrew B. Kaplan, Esq.*, on the brief); David *G. Miller, Esq.* (*Loeb and Loeb*), Los Angeles, Calif.; for the Charging Party AMPTP.

Richard N. Fisher, Esq. (*O'Melveny & Myers; Raymond P. Herman, Esq.*, on the brief), Los Angeles, Calif. for the Charging Party Networks.

DECISION

Statement of the Case

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Los Angeles, California, on several dates from May 21 until November 26, 1973.[1] The hearing was closed by an order dated January 25, 1974.

1. Procedure

Upon a charge filed in Case No. 31-CB-1203-2, on March 8, against Writers Guild of America, West, Inc. (herein "Respondent") by Association of Motion Picture and Television Producers, Inc. (herein

[1]All dates herein are in 1973, unless otherwise noted.

"AMPTP"), and a charge filed in Case No. 31-CB-1223, on April 4, against Respondent by American Broadcasting Companies, Inc. (herein "ABC"), Columbia Broadcasting System, Inc. (herein "CBS") and National Broadcasting Company, Inc. (herein "NBC") (herein jointly "the Networks") the Regional Director for the Thirty-first Region, on April 18, issued an Order Consolidating Cases and a Consolidated Complaint against Respondent, which was amended by the issuance of a Consolidated Amended Complaint on May 23. Respondent filed timely answers. Hearing on this complaint was concluded on June 13.

Upon a charge filed in Case No. 31-CB-1313, on July 11, by the Networks, and a charge filed in Case No. 31-CB-1316, on July 16, by AMPTP against the Respondent, the Regional Director, on July 25, issued an Order consolidating those two cases and a Consolidated Complaint. Respondent filed timely answer. By a Joint Motion dated August 2, the parties requested that the four cases be consolidated, and the record reopened for further hearing. This motion was granted by order dated August 10.

Upon a charge filed in Case No. 31-CB-1355, on September 5, against Respondent by QM Productions (herein "QM"), the Regional Director, on September 20, issued a complaint in that case. Respondent filed timely answer. By motion dated November 9, General Counsel requested that Case No. 31-CB-1355 be consolidated for the purposes of hearing and decision with the four cases previously consolidated. On November 13, an Order to Show Cause why this motion should not be granted was issued. The motion was granted at the hearing held on November 26. Thereafter,

General Counsel filed a motion dated December 11, to substitute a Second Consolidated Amended Complaint for all complaints previously issued in the above-captioned cases, to which Respondent filed an answer dated December 13. Finally, in lieu of further hearing in these matters, all parties submitted a stipulation of facts with exhibits attached, dated December 17. By Order dated January 25, 1974, General Counsel's motion to substitute the Second Consolidated Amended Complaint for all prior complaints was granted and the complaint and the answer thereto were received into the record, and the stipulation of facts, with specified exhibits, was received, the hearing in this proceeding was closed, and date set for receipt of briefs.[2]

2. Allegations

The various complaints issued in this proceeding, cumulated in the Second Consolidated Amended Complaint (herein referred to as the complaint), allege that Respondent violated Section 8(b)(1)(B) of the Act by restraining and coercing employer-members of AMPTP, and NBC, CBS, ABC, and QM in the selection of their representatives for collective bargaining and the adjustment of grievances by threatening to discipline and by disciplining certain persons and classes of persons employed by the aforesaid employers, such persons and classes of persons being, it is alleged, members of Respondent, and supervisors within the meaning of the Act for their respective employers and

[2]Exhibit numbers have previously been assigned to all formal papers with the exception of my Order of January 25, 1974 and General Counsel's telegraphic response thereto, received February 4, 1974. The Order is hereby received as General Counsel's Exhibit 14L, and the response is received as General Counsel's Exhibit 14M.

representatives or potential and likely representatives for their employers for the purposes of collective bargaining or the adjustment of grievances within the meaning of the Act.

Respondent's answer to the complaint, while admitting certain allegations, denies the alleged unfair labor practices.

Upon the entire record in this case, from observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Respondent, and the Charging Parties,[3] I make the following:

Findings and Conclusions

I. Jurisdiction

AMPTP is an association located at Los Angeles admitting to membership firms engaged in the production and distribution of motion picture and television films, and existing, in part, for the purpose of negotiating, executing, and administering collective-bargaining agreements on behalf of its employer-members with the bargaining representatives of their employees, including the Respondent. AMPTP members collectively annually sell and ship from their studios in California directly to points outside that state motion picture films and other products valued in excess of $50,000.

ABC, CBS, and NBC each have offices in various locations throughout the United States including California, and each derives gross revenues in excess of

[3]After the decision of the Supreme Court in *Florida Power & Light Co. v. I.B.E.W. Local 641, et al.*, [417 U. S. 790] 86 LRRM 2689, the parties were invited to file briefs, no later than August 9, 1974, with respect to the impact of that decision upon this case and did so. I have also issued a separate order correcting some inaccuracies in the transcript.

$100,000 from sales to customers located outside California, and each annually purchases goods valued in excess of $50,000 directly from suppliers located outside California.

QM, a corporation with its principal place of business in Burbank, California, engaged in the production and distribution of motion picture and television films, annually sells such films valued in excess of $50,000 directly to customers located outside California.

Respondent's answer admits, and it is found that the Association, and its members through the Association, CBS, NBC, ABC, and QM are employers engaged in commerce within the meaning of the Act.

Respondent's answer admits, and it is found that Respondent is now and at all times material has been a labor organization within the meaning of the Act.

II. Preliminary Statement of Facts and Principal Issues

Respondent has for some time represented persons engaged in writing functions employed by members of AMPTP, the Networks, and certain independent producers such as QM. As a result of prior bargaining, Respondent was a party to collective-bargaining agreements with AMPTP, for its members, with the Networks, and with QM due to expire in 1973. The AMPTP agreements were terminated effective March 4, by notice from the Respondent pursuant to the terms of the agreements. On or about that same date, Respondent engaged in a strike against the AMPTP and its employer members which continued until June 24, during which time Respondent picketed some of those employers at various times. Beginning on or

about March 29 and continuing until July 12, Respondent engaged in a strike against NBC, CBS, and ABC, and maintained picket lines at the premises of each of them. Beginning on or about March 4, and continuing until March 17, Respondent engaged in a strike against and maintained a picket line at the premises of QM.

In February and thereafter, Respondent adopted and distributed to all its members some 31 strike rules (later reduced to 30, as discussed hereinafter), in anticipation of the strike which ensued. In essence these rules (hereinafter considered in some detail) forbade members of Respondent to do any work of any sort for employers on strike, or to cross picket lines to go upon the premises of such employers without specific permission of Respondent. Respondent took other action, and caused certain publicity to issue designed to impress upon its members the consequences of violating these Rules.

At the times material to this proceeding, Respondent's membership included a substantial number of persons engaged in performing functions other than writing for their employers in the industry. Because of their ability to perform in more than one capacity, such as producing, directing, or writing, these persons are referred to as "hyphenates". It would appear that many of these, if not most, have not engaged in creative writing for years. Respondent asserts, however, that even when their principal function is other than writing, the nature of the work is such that they must and do engage in some writing. The hyphenate's principal work function (other than writing) will sometimes be referred to herein as his (or the) "primary function."

General Counsel contends that these hyphenates occupy supervisory positions within the meaning of the Act, and are representatives, or potential and likely representatives, for their respective employees [*sic*] for the purposes of collective bargaining or the adjustment of grievances.

The record indicates that Respondent was particularly concerned that its hyphenate members should not cross picket lines or go to work during the strike. Members who were in a withdrawn status prior to the strike were reactivated. Most of the hyphenates appear to have held only associate membership in Respondent at the time. Those hyphenates questioned indicated their understanding that, as associate members, they had no right to vote on the adoption of the Respondent's strike rules, and did not do so. With one exception, the hyphenates also testified to the same effect with respect to the vote authorizing Respondent to strike. Herbert Wright, an associate producer, testified that at the strike vote meeting he was given a card permitting him to vote on authorization of the strike, but was not given an opportunity to vote on the strike rules.

Respondent's Constitution and By-Laws in evidence (G.C. Exh. 12a) are confusing on the issue. Those in effect until December 1972 provide in Article IV, Section 6, paragraph 1, that associate members shall not have the right to vote, while Article XIV, Section 8 (last paragraph) states certain restricted circumstances in which associate members may vote on strikes. In the latter part of the booklet are proposed changes in the Constitution and By-Laws. Assuming that these were in effect at times material to this case, Article

IV, Section 7(b) provides that associate members under certain conditions (different from those noted above) might vote on strikes. However, it is not shown that any hyphenate involved herein satisfied these latter conditions. Counsel for Respondent, during the disciplinary hearing concerning hyphenate-member Coles Trapnell, asserted that Associate Members could not vote on the strike rules as such.

At least one of these hyphenate-members attempted, prior to the strike, to resign from membership in Respondent. In accordance with the provisions of the Constitution and By Laws, Respondent rejected the attempted resignation, "in view of current contract negotiations and the importance to the Guild of maintaining effective communication with its membership," advising that the member must maintain his membership at least during the period of negotiations and probably for 6 months thereafter. This became known to other hyphenates prior to the strike. It was stipulated by the parties that at all times material this refusal to permit any member to resign from membership during the pendency of collective-bargaining negotiations, and for 6 months thereafter, was the policy of Respondent.

From approximately April 6 through about November 8, Respondent served charges for violation of strike rules and notice of disciplinary hearing upon at least 31 hyphenate-members. At least 15 such hearings have been held and penalties imposed on no less than 10 of those charged. It is indicated that other trials were contemplated at the time of the receipt of the filing of the last stipulation of facts by the parties and that appeals were pending from penalties imposed. Other action appears to have been stayed pending disposition of this proceeding.

The major issues to be resolved are the following:

1. The alleged status of the various hyphenates as supervisors and representatives for collective bargaining and the adjustment of grievances. This was considerably litigated. However, in its brief, Respondent, as hereinafter noted, appears to concede that hyphenates performing many functions in dispute (other than that of story editor) are supervisors within the meaning of the Act, and may adjust grievances of employees other than writers represented by Respondent.

2. Whether various actions of alleged restraint and coercion of hyphenates by Respondent designed to compel the hyphenates to cease work for the struck employers, and Respondent's actions in charging, trying, and penalizing such members for going to work during the strike, violated Section 8(b)(1)(B) of the Act. Also whether Respondent's refusal to allow such hyphenates to resign from membership in these circumstances violated the Act.

3. Whether certain issues in this matter should be deferred to arbitration under the parties' collective-bargaining contracts.[4]

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[4]In its answer to the complaint Respondent asserted as three "Separate Special" defenses the claims that 1) by the terms and provisions of the various bargaining agreements, the employers had waived the right to designate Respondent's members as representatives for collective bargaining or the adjustment of grievances during the strike; 2) by the terms and provisions of the various bargaining agreements, the employers had agreed Respondent's members, including supervisors, might refuse to work during the strike "and be subject to Guild discipline for crossing picket lines or working for struck employers . . ."; and 3) that the two issues set forth should be deferred to arbitration. In its original brief at p. 19, Respondent has withdrawn its first two special defenses. The third is considered hereinafter.

III. The Supervisory Issues

The General Counsel contends that persons performing the following functions are supervisors within the meaning of the Act, and are representatives or potential or likely representatives of their employers for the purposes of collective bargaining or the adjustment of grievances:

1. *Executive Producer, Producer, and Associate Producer.* The producer has the primary responsibility for the production of films for motion pictures or for television. This responsibility begins with the idea or concept for the film or the series; includes involvement in the budget for the film; the employment of a writer or writers who develop and write the scripts under the supervision of the producer or others associated with the producer; the employment of a director and cast for the film, as well as other employees necessary to make the film (cameraman, etc.); the selection of sets, locations; the performance of executive functions during the filming; and the performance of executive functions in the post-production stages, after filming.

The producer has substantial responsibility and authority in adjusting grievances between directors and craft employees, directors and actors and actresses, between two or more actors or actresses, and in other similar situations. Producers also have responsibility and authority to adjust grievances involving writers, as in the case of disputes between writers and story editors. In one instance in which a dispute arose as to whether a commitment had been made to a free-lance writer, the producer involved decided that no commitment had been made. The testimony shows that

if the producer had decided that a commitment had been made, that would have been binding and resolved the dispute. Producers also make the initial determination in situations in which there may be dispute over the assignment of screen credits to writers, although this is a complex matter, subject to extensive review. In situations in which the film is being shot on a distant location, the producer may be involved in negotiating or agreeing to short-term agreements with local unions where the services of local craft members are required, and possibly adjusting, or attempting to adjust, local jurisdictional conflicts.

In general, an executive producer supervises one or more producers (this seems to be particularly the case in the television industry where an executive producer may have responsibility for several series or projects at the same time, each with its own producer). The associate producer is an assistant to the producer. Without distinguishing among them in detail, it is clear on this record that persons occupying these positions in the motion picture or television industries have the authority to hire, terminate, and responsibly direct other employees, and to adjust employee grievances, or to effectively recommend such action, and are thus supervisors within the meaning of Section 2(11) of the Act. Respondent does not contest this finding or conclusion (brief, pp. 7-8), except, as noted, in respect to the producer's role in adjusting grievances of writers. (Brief, pp. 4, 7-8). As found above, however, I find that producers, executive producers and associate producers do or potentially may adjust grievances involving writers.

Respondent contends that persons performing the functions considered here, as well as those occupying

positions described hereinafter, as a normal part of their work, perform writing functions coming within the jurisdiction of Respondent. This contention will be considered hereinafter in a separate section of this decision devoted to this issue.[5]

The record indicates approximately 80 hyphenate-members of Respondent in the position of Executive Producer, Producer, or Associate Producer employed by the charging parties in this matter (including major members of AMPTP). Among them, the following were charged by Respondent with violation of its strike rules: Philip Barry, Hugh Benson, Cy Chermack, Robert Cinader, Barry Crane, Jon Epstein, Andrew J. Fenady, Stephen Heilpern, Ron Honthaner, Leonard Katzman, David Levinson, Roger Lewis, James McAdams, John T. Mantley, Thomas L. Miller, Martin Ransohoff, William Roberts, Albert Ruddy, Herman S. Saunders, David Victor and Herbert Wright.[6] Of these, Chermack, Cinader, Crane, Epstein, Levinson, Saunders, Victor, Ruddy, Benson, and Roberts were brought before trial panels set up by Respondent. Some of these were disciplined by Respondent as noted hereinafter.

2. *Directors.* Persons in this category are in direct charge of the principal photography of the film. They

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[5]Respondent adduced considerable testimony concerning certain hyphenates who are legally employed by their own wholly-owned corporations, which corporations furnish the hyphenates' services to employers involved in this proceeding. This is referred to in the record as a "loan out" agreement. The record is convincing and I find that such "loaned-out" employees occupy the same positions as more conventionally employed persons doing the same work and are treated the same by the employers here involved. It is noted that Respondent makes no point of this in its brief.

[6]There are two or three additional producers noted on G.C. Exh. 3 as having received charges who were not listed in the parties' post-hearing stipulation and for whom copies of the charges were not submitted.

hire or effectively recommend the employment of crew and actors, effectively direct such employees, and may discharge or effectively recommend the discharge of employees. They have authority to and do adjust grievances of such employees. It is found that persons performing the functions of director in the television and motion picture industries are supervisors and adjust grievances of employees within the meaning of the Act.

The record indicates approximately 15 hyphenate members of Respondent in this position employed by the charging parties (without duplicating those listed as producer-directors, or the like). Of these Respondent charged the following with violation of its strike rules: Philip Kaufman, Michael Crichton and Sam Peckinpah, Crichton was brought before a trial panel and was disciplined.

3. *Story editors, story consultants, script consultants, executive story editors, executive story consultants.* Although there may be some differences among these classifications, or in the requirements of the various employers for these positions, these job functions may be considered together for our purposes under the title of "story editor." The story editor is of principal assistance to the producer in the highly important functions of dealing with scripts and writers. The story editor may be, and frequently is, concerned with reading and acquiring scripts, interviewing writers and recommending them for hire (or otherwise), directing and supervising writers in the development of ideas and the preparation of scripts, and in recommending that writers not be retained. On a television series, the story editor may participate with the producer in the initial determination of any dispute over screen credits.

He also may serve as a buffer between management and the writer, as in ameliorating a writer's distress over material that has been rewritten. Thus one executive story editor testified that because he is the first person in the studio that the writer meets, and due to the story editor's close association with the writer, "if he [the writer] has a problem, more likely than not, he will come to me because it is usually a problem with a producer, or things aren't working out." During the disciplinary trial of one in this group, Coles Trapnell, it was indicated that he supervised story analysts employed by the employer.

In all of these functions it is found the story editor is expected to and does use individual judgment, initiative and responsibility. On the basis of the entire record, it is found that those persons in the television and motion picture industries performing the functions of story editor, story consultant, script consultant, executive story editors, and executive story consultants are supervisors and adjust grievances of employees within the meaning of the Act.[7]

Of approximately 15 hyphenate-members of Respondent in this position employed by the charging party in this matter. [*sic*] Respondent charged Robert Blees, Frank Paris, and Coles Trapnell with violation of Respondent's strike rules and brought them before a disciplinary trial board of Respondent.[8]

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[7]In *Metro-Goldwyn-Mayer Studios, et al*, 7 NLRB 662, at 696, the Board at the request of Screen Writers Guild, Inc., found story editors in the motion picture industry to be executives and supervisors and excluded them from a unit of writers sought by that union.

[8]It is noted that Respondent made no effort during these disciplinary hearings to show that these men did any writing

(This footnote is continued on next page)

4. *Other classifications.* The General Counsel argues that hyphenates in other classifications, who received Respondent's strike rules, or were threatened with charges or were charged with violation of those rules, or were tried at disciplinary hearings for violation of those rules, are also supervisors and representatives, or potential representatives, of their employers for collective bargaining or the adjustment of grievances. The record indicates that these persons do occupy executive or management positions. However, my analysis of the record shows that all of the persons revealed by the record who were both charged *and* tried by Respondent for violation of the strike rules are contained in the classification previously considered, except Jerome Bredouw, and the charges against Bredouw were dismissed after trial, and, so far as this record shows, no penalty was assessed against him. In the circumstances it would serve no useful purpose to consider such other classifications in which those hyphenates are employed.

IV. The Writing Function

Respondent argues, in essence, *inter alia,* that all of the above categories normally and regularly engage in writing within the jurisdiction of the Respondent, and that it should be inferred, therefore, that those hyphenate members of Respondent who went to work during the strike must have engaged in such writing. This is largely disputed by witnesses for the General

or performed any functions during the strike which were not normal to the primary function of the classification. During the Trapnell hearing, indeed, Respondent's Counsel stated, typical of Respondent's position in these hearings, that "[i]t is immaterial [to Respondent's charges against Trapnell] what type of services were being rendered, whether they were writing services or other services."

Counsel and defendants at the disciplinary hearings who testified that they do not in the performance of their primary function for their employers normally or regularly perform writing coming within Respondent's collective-bargaining agreements and specifically did not do so during the strike. This requires, at the outset, some consideration of the functions of writers represented by the Respondent under the various agreements.

Referring to the 1970 Theatrical and Television Basic Agreement between Respondent and the employer members of AMPTP, it is noted that the parties recognized that members of the Guild could be employed in capacities other than as writers. It is provided in Article 14, paragraph A, of that Agreement, referring to "writers in non-writing capacities," that where such individual is employed "to render services in a capacity or capacities other than as a writer," those "services shall not be subject to this Basic Agreement."[9] It is further provided that where such an individual is also employed as a writer (as defined in the agreement), such services shall be performed under a separate agreement providing for compensation as set forth in the agreement.

Article 14, paragraph B of that Agreement also provides in pertinent part, that "A person employed as a writer for a series whose duties include for that

[9]Although the heading of Article 14 would indicate that it applies only to the "television" side of the industry, it is noted that Article 1B1. of the Agreement, which defines the term "writing" in the "theatrical" side of the industry, also adopts the language of Article 14.

Article 1A 11. of the 1970 Networks basic agreement also states that with limited exceptions the agreement "shall not nor is it intended to cover the services of Producers, Directors, Story Supervisors, composers, non-writing capacity. . . ."

series interviewing other writers, suggesting story ideas or script changes to other writers, or recommending approval of material submitted by writers, shall be subject to this Basic Agreement (excluding Executives, Executive Producers, and Producers; and also excluding persons who are employed as bona fide Associate Producers, who do not perform services as a writer for the series and where the above duties of such persons are incidental to their primary duties)."

The term "writer" as defined in Article 1, paragraph B.1.a., and paragraph C.1.a. of that Agreement, includes, in pertinent part, a person "who performs services . . . in writing or preparing . . . literary material or making revisions, modifications, or changes in such literary material . . . , provided, however, that any writing services described below performed by Producers, Directors, Story Supervisors (other than as provided in Article 14 hereof), . . ., or other employees, shall not be subject to this Basic Agreement and such sources shall not constitute such person a writer hereunder: (a) Cutting for time, (b) Bridging material necessitated by cutting for time, (c) Changes in technical or stage directions, (d) Assignment of lines to other existing characters occasioned by cast changes, (e) Changes necessary to obtain continuity acceptance or legal clearance, (f) Casual minor adjustments in dialogue or narration made prior to or during the period of principal photography, (g) Such changes in the course of production as are made necessary by unforeseen contingencies (e.g., the elements, accidents to performers, etc.), (h) Instructions, directions, or suggestions, whether oral or written, made to writer regarding story or teleplay." These latter eight exceptions were referred to during the hearing, and will be referred to herein, as "A to H functions."

There is no dispute that a person writing an original story, story outline, treatment, or finished script for television or motion pictures is performing writing functions within the meaning of the contract between the Respondent and the various employers. Some persons who have written such scripts may thereafter, if they have the capacities, be engaged to produce those scripts or direct the photoplay made from such a script. In such cases, such director, or the producer would have a separate agreement with the employer covering such sources, in accordance with Respondent's collective-bargaining agreement. Some producers and directors who have the capacity to write may have separate agreements with their employers covering possible writing assignments even in situations in which the employer does not actually require them to write.

An issue arises, however, as to what writing is done on scripts after the writer has delivered a finished script which has been accepted by the employer, and who does such writing. Again there seems no question that numerous changes are made in some scripts prior to principal photography, during principal photography, and thereafter before release of the film. Many of these changes, perhaps most, involve A to H functions, and may be made by producers or directors or story editors whether or not they are members of the Respondent. It is indicated that prior to the strike, other changes of a more substantial nature might be made in the script when the producer or the director desired. Such changes would be made by persons qualified under the applicable contract between Respondent and the employer.

Respondent argues, however, that even when management executives and supervisors perform functions

which have been excluded from the bargaining agreements, such as A through H functions, they are nevertheless performing writing functions within the jurisdiction of Respondent. The argument misses the point. It is not necessary to decide here what constitutes writing, or even what different segments of the industry might consider writing as such. The important point is that when these executives and supervisors perform those functions excluded from the Respondent's bargaining agreements they thereby perform functions which the parties have acknowledged do not constitute work reserved to Respondent's non-hyphenate members under the agreements, but rather are accepted as a normal part of the duties and responsibilities of the executives and supervisors (as hereinabove discussed) employed by the employers involved.[10]

V. Strike Related Activities

1. *Respondent's strike rules*

In February, the Respondent promulgated and distributed to all its members, including hyphenates occupying positions discussed above, a list of 31 RULES FOR CONDUCT OF MEMBERS DURING A STRIKE. These received considerable publicity in the local papers and the trade press. Fifteen of these strike rules relate, in whole or in part, to prohibitions against writing for struck employers, or the submission of literary material to such employers (Rules 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 16, 18, 23, 25). Various

[10]In some of the disciplinary trial transcripts, it is noted that Respondent's counsel argued vigorously that functions excluded from Respondent's agreements, such as A through H, were excluded because the economic strength of the employers in bargaining. However, this is the classic way in which management and supervisory rights and functions are differentiated from rank and file functions under a bargaining agreement.

rules with which we are not particularly concerned here deal with such matters as the use of fictitious names (Rule 15), acts of agents (Rules 17, 20), individual negotiations by members (Rule 21), penalties provided by Respondent's Constitution and By-Laws (Rule 29), and enforcement of the rules by committees (Rule 31). The remaining rules in pertinent part, are as follows:

1. Any act or conduct which is prejudicial to the welfare of the Guild is subject to disciplinary action. Conduct tending to defeat a strike or in any way weaken its effectiveness is per se conduct prejudicial to the welfare of the Guild.

12. All members are prohibited from crossing a picket line which is established by the Guild at any entrance to the premises of a struck producer.

13. Members are prohibited from entering the premises of any struck producer for the purpose of discussion of the sale of material or contract of employment, regardless of the time it is to take effect. Members are also prohibited from entering the premises of any struck producer for the purpose of viewing any film . . . should a member find it necessary to visit the premises of a struck producer for any reason apart from the foregoing he should inform the Guild in advance of the nature of such prospective visit.

19. A member may not, during the course of a strike, conduct negotiations with a struck producer for financing the production of any of his literary material or scripts, or for his participation in such production in any capacity.

22. A member is chargeable with knowledge of all strike rules and regulations, . . . circularized through the mail to the membership and of any strike information made known . . . through . . . trade papers, newspapers, radio broadcasts or telecasts. . . .

24. All members, regardless of the capacity in which they are working, are bound by all strike rules and regulations in the same manner and to the same extent as members who confine their efforts to writing.

26. The term "member" encompasses anyone admitted to the membership rolls of the Writers Guild of America, both West and East, and classified as either active or inactive, associate, withdrawn or suspended, whether in good standing or bad.

27. No member may be relieved of the responsibility for the payment of any fine, or from any disciplinary action resulting from any infraction of strike rules by offering his resignation from the Guild. Membership in any guild or union is not a voluntary association of parties but a binding contract between them which cannot be abrogated unilaterally by either party except under provisions of the Guild constitution or state or federal law. It should be noted that fines levied for infringement of strike rules are collectible in a suit at law.

28. The Guild shall have the authority to assign and direct members in the performance of duties relating to the strike including, but not limited to, picket duty. Any member found guilty of refusal to perform picket duty shall be fined not less than $100 per day for each day of such refusal to perform.

30. No member shall work with any individual, including a writer-executive who has been suspended from Guild membership by reason of his violation of strike rules, or has been found by the Council to have violated strike rules, in the event no disciplinary action was instituted against such person.

By means of meetings and publicity, and through personal contact, memos, telegrams and letters, Respondent emphasized and confirmed that these rules would be enforced against the hyphenate-members.[11] The hyphenate-members were particularly vulnerable to pressure under rule 30 because in their primary work as producers, directors, story editors, and executives, they would be unable to effectively function in the future if writer-members of Respondent refused to work for or with them. In telephone conversations with certain of the hyphenates, agents of Respondent emphasized this consequence should the hyphenate cross the picket line to work. The wife of one hyphenate-member was assured that Respondent would end her husband's rather distinguished career by not permitting

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[11]One such communication was a telephone conversation between Herbert Wright, a producer, and Alan Griffiths, Assistant Executive Director of Respondent. During the hearing, Respondent asserted a variance between Wright's testimony and his affidavit held by the General Counsel and further requested that I accept Wright's affidavit as substantive evidence under the rule of evidence in California. See *Starlite Mfg. Co.* 172 NLRB 68, 71-3. The issue is not mentioned in Respondent's briefs. I have carefully considered Wright's testimony and his affidavit, and I credit Wright's testimony as given at the hearing. Treating Wright's affidavit as substantive evidence would not affect the findings made herein.

writers to work with him if he crossed the picket line. On April 14 during the strike, Respondent issued a press release, which received wide publicity, concerning the filing of charges against "five writer-producers", Jon Epstein, Cy Chermak, Herman Saunders, David Victor and Jack Webb, for "crossing a picket line for the purpose of going to work for a struck company." The release stated that in addition to other possible penalties, if they were convicted, these men would, "according to Guild officials", "appear on a 'Roll of Dishonor,'" and "be listed in Guild publications 'in perpetuity so that Guild members for years to come will never forget.'". The Guild official assertedly "characterized those members guilty of scabbing as 'pariahs who have betrayed their colleagues.'"

After the issuance of the original consolidated complaint in this matter Respondent, on April 30, rescinded Rule 30, and by letter to all its members, dated May 7, advised:

> Old Rule 30 provided that no member shall work with any individual suspended or disciplined because of violating strike rules. The Guild's position has been, and remains, that it will press disciplinary action as vigorously as the law and good union principles permit, against every member guilty of violating strike rules. Because the old rule could be misconstrued to mean that the Guild was maintaining an improper sanction, a matter of anathema to this Guild, the Board of Directors rescinded old Rule 30 at its regular monthly meeting of April 30, 1973. This action was taken voluntarily, in the belief that ample disciplinary measures remain available to trial committees, including penalties of fines, expulsion from membership and other sanctions, and with the conviction that even in the pursuit of strike discipline, members of the Guild do not wish to be a part of an action which carries the odious implications of a "black list."

2. *Pressures on hyphenates by employers and others*

As previously noted, the hyphenates here involved in most cases had personal services agreements with their employers to perform in their primary capacities as directors, producers, story editors, and the like. It would also appear that many were members of labor organizations representing them in those capacities, some of which organizations, if not all, apparently held bargaining contracts with the employers.

Prior to the strike, various employers parties to bargaining contracts with Respondent sent communications to hyphenates they employed insisting that they come in to work to perform their regular functions other than writing in the event of a strike. The following letter, in pertinent part, from Twentieth Century-Fox Film Corporation is typical:

> We intend to continue our operations and meet our contractual and moral obligations to supply theatrical and television motion pictures to our customers and the public.
>
> If you are a member of the Writers Guild you may have received from the Guild a set of rules purporting to govern your conduct during the strike "regardless of the capacity" in which you are employed. We also understand that the Guild may have threatened you with fines and blacklisting in the event it calls a strike and you render services for us in any capacity or you fail to

report for picket duty. Any attempt of the Guild to interfere with your services for us in a capacity other than as a writer is unlawful and the Guild's threat of fines, censure, expulsion and blacklisting is unenforceable.

* * *

We expect you to fulfill your contractual obligations to us as a supervisor[12] and report to work notwithstanding any picket lines or other attempt to interfere with your complying with your contractual obligations. We trust that you understand that we will have no alternative but to resort to our legal rights and remedies in the event of a failure on your part to do so. Should the Guild attempt to fine or otherwise discipline you for meeting such obligations to us, you will be provided with a defense to any such proceeding, without cost to you, and you will be indemnified against any fine which might be imposed and which is legally sustained.

Prior to sending these letters, the members of the AMPTP and the networks had determined that they would not require the hyphenate-members of Respondent to write during the strike.

In addition to these letters, it appears that the hyphenates were placed under certain pressure to perform by the unions holding contracts with the employers covering the principal function for which the hyphenate was employed. Thus, according to a counsel for the Directors Guild, at the time of the Respondent's strike, the Director's Guild held a no-strike contract

[12]At this point some employers inserted the specific function, e.g., Director, Producer, etc., for which the individual was engaged by that employer.

with employers of hyphenates working as directors, assistant directors, and unit production managers, and felt obligated to inform its members that if they refused to render services covered by the bargaining agreement and the hyphenate's personal service contracts (other than writing), they would be subject to suits for large damages and other penalties.[13]

3. *Enforcement of Respondent's strike rules*

As has been previously noted, Respondent, by issuance of the strike rules, by a meeting with the hyphenate members prior to the strike, by communications and publicity, emphasized that it would take disciplinary action against the hyphenates who went to work during the strike in any capacity. The hyphenates held meetings of their own to determine the proper course to follow.

Some hyphenates went to work. The record shows that a number of the hyphenates (I would assume most of them, if not all) advised their employers that they would do no writing, but would only perform services under their personal services contracts as producers, directors, etc., as the case might be. There is evidence that Respondent was informed of this.[14]

[13]This statement was made during the disciplinary trial of John Michael Crichton. There are indications of similar action by the Producers Guild, and legal action taken against that union by Respondent.

[14]Frank R. Pierson, a producer, advised Respondent that he had a personal services contract to produce a film which he intended to perform during the strike, that the script was finished and no more writing services would be performed. Pierson offered to provide and did later provide a copy of the final shooting script so that Respondent "could compare it with the shooting continuity . . . to see whether . . . anyone had indeed done any writing." Herbert Wright, after informing Respondent that he would work only as an associate producer

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During the various disciplinary trials of the hyphenates who worked during the strike, Respondent, as noted above, for the most part professed little or no interest in what kind of work was done during the strike, and presented no proof that the work done by the hyphenates was covered by the recently terminated contracts held by Respondent.[15] The evidence is that the hyphenates who worked during the strike performed the normal functions of the primary positions for which they were employed prior to the strike, e.g., director, producer, story editor, etc., or in some other executive position, and exercised the authority appertaining to such positions.[16]

From April 6 through November 8, 1973, Respondent notified more than 30 hyphenate members that

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and was not employed to write, nor would he write, was advised that he would be in violation of the strike rules if he went to work. Crichton, who performed as a director during the strike, also informed Respondent that he had ceased writing on the project and testified that Respondent could confirm this. During his disciplinary hearing it appears that Crichton's employer did provide means for confirming this. Paris, an executive story editor informed Respondent that he would work in an executive capacity. Trapnell, also an executive story editor, did work as an executive during the strike.

[15]It was stipulated at the hearing in this matter that counsel for the Respondent who participated in the disciplinary hearings instituted by Respondent would testify that he took the position at such hearings that the hyphenates charged "are subject to discipline for crossing Respondent's picket line without regard to wnether they cross the picket line for the purpose of performing bargaining [unit] services for a struck employer or not. And that the charges will properly lie for crossing the picket line even if the person charged has given assurances to a representative of [Respondent] that he is not and will not perform any [writing] services for the struck employer."

[16]E.g., Robert A. Cinader, during his disciplinary hearing, referred to the adjustment of a dispute between a cameraman and an actor and others; Producer Albert S. Ruddy testified to hiring a lead actor; others asserted their general function and authority as supervisors and in the adjustment of grievances.

they had been charged with violation of Respondent's strike rules and set hearings on the charges. The only rules alleged to have been violated were rules 1, 12, 13 and 28. Most hyphenates were alleged to have violated rules 1, 12 and 13; some only rules 12 and 13; some rules 1, 12, 13 and 28; some rules 12, 13 and 28, and one only rule 12. Typical of the language of the charges is the following:

* * *

> NOTICE IS HEREBY GIVEN that you are charged with violation of the Guild's Strike Orders and Sections 1, 12, 13, and 28 of the Rules for the Conduct of Members during a Strike, dated February 20, 1973, as amended May 1, 1973, copies of which is attached hereto.
>
> Specifically, you are charged with: (1) having crossed the Guild's picket lines at CBS Studio Center, during the months of March, April, May and June 1973, without having informed the Guild in advance of the nature of your business with said company and without having obtained a Guild pass to enter said premises; (2) having during the months of March, April, May and June 1973, rendered services for Columbia Broadcasting System, Inc., a company against whom the Guild was at such times on strike; and (3) refusing to perform picket duties during the strike after having been requested to do so by representatives of the Guild.[17]

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[17]Testimony by Respondent's officials in the disciplinary hearings makes clear that passes would not have been granted to hyphenates to go in to work as producers, directors, or

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The record contains the transcript of disciplinary trials of 15 of those charged. The charges against at least one of these was dismissed. From June 25 through September 28, 1973, Respondent's Board of Directors issued the following disciplinary penalties against 10 hyphenate members, in addition to costs of the hearing: Two were expelled from membership and fined $50,000 each; one was expelled from membership and fined $10,000; one was suspended from membership for 2 years and fined $10,000; one was suspended for 2 years and fined $7,500; one was suspended for 3 years and fined $5,000; one was expelled from membership and fined $2,000; one was expelled and fined $100; and one was suspended for 2 years and fined $100.[18] These penalties received wide publicity in the local press and trade papers. The appeals of nine of these men has been voted upon by Respondent's membership at a special meeting and the penalties were drastically reduced. Apparently all remaining actions with respect to discipline of hyphenate-members for working during the strike are now being held in abeyance pending resolution of these cases.

VI. The Requests for Arbitration

During the course of the strike, by letter dated April 28, 1973, Respondent made certain requests for arbitration upon AMPTP and the Networks, with car-

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the like, even if requested. It is also noted that some hyphenates did agree to perform picket duty at some places notwithstanding they were crossing other picket lines, which, understandably, tended to create some confusion.

[18]The 10 hyphenates penalized for violation of Respondent's strike rules were Hugh Benson, Robert Blees, Cy Chermack, Jon Epstein, David Levinson, John Mantley, Herman Saunders, David Victor, Robert Cinader and Barry Crane. No disciplinary hearing transcript for Crane appears in the record.

bon copy to the Board's Regional Director. The following letter to AMPTP sets forth the basis for the requests:

> Gentlemen:
>
> Reference is made to the Writers Guild of America 1970 Theatrical and Television Film Basic Agreement ("Agreement"). A dispute exists between the Guild on the one hand and the Association its member companies on the other hand concerning the interpretation of the terms of the Agreement and their application and effect with respect to the effect of the current strike by the Guild on the employment contracts of its members and the claimed right of yourself and the companies to complain of the Guild's enforcement of its strike rules with respect to all its members, including those employed in other capacities. The Guild submits the following questions to grievance and arbitration:
>
> 1. Whether by virtue of the provisions of said Agreement, and particularly Article 7, all contracts of members of the Guild with employer companies as to whom the Guild is on strike have been suspended, including the contracts of all members no matter in what capacities they have been employed; and
>
> 2. Whether by virtue of the provisions of said Agreement, and particularly Article 7, the definition of writer, and other provisions, the Association and the Companies have waived the right to designate or select members of the Guild as representatives of employers for the purposes of collective bargaining or the adjustment of grievances and the right to complain of discipline threat-

ened or imposed by the Guild on any of its members.

This will constitute a notice of grievance in accordance with the provisions of the Agreement with you and your member companies that the Guild submits the dispute to grievance and arbitration pursuant to the provisions of Articles 10, 11, and 12 of the Agreement. In that connection, the Guild is willing to waive the grievance step and proceed directly into arbitration.

By letters dated May 14, and May 18, AMPTP and the Networks replied denying Respondent's grievance and request for arbitration. The pertinent part of the AMPTP letter, in substance similar to the Network's [*sic*] reply, is as follows:

This is in response to your letter of April 28, 1973, in which you claimed that there is a dispute between the Guild and the Association and its member companies concerning the interpretation and application of the terms of the . . . ("Agreement") in connection with the current strike of the Guild.

* * *

In view of the legal nature of the questions raised by you, and by virtue of the fact that your letter was obviously an effort to make a record for purposes of the imminent National Labor Relations Board proceeding in which a complaint has been issued against the Guild, your letter was carefully reviewed by our attorneys.

Your request to arbitrate the foregoing issues is hereby denied for the following reasons:

1. The Grievance and Arbitration procedure which you seek to invoke is no longer in effect

between the Guild and the members of the Association as to any matters arising subsequent to March 5, 1973. By your letter of February 2, 1973, you terminated the collective bargaining agreement containing these provisions effective March 4, 1973. Additionally, after we had reached an impasse by letter of March 27, 1973, we advised you that effective April 2, 1973, our member companies intended to effectuate certain changes in working conditions including that they would no longer apply the Grievance Arbitration provisions of the Agreement, except as to matters arising before March 5, 1973. You were given an opportunity to bargain about this intended change but failed to do so and on April 2, 1973, said change was implemented.

2. There is no colorable claim that could be made for the applicability of the Grievance and Arbitration Procedure of the Agreement to the two issues raised by you even if such Grievance and Arbitration Procedure were still available. The effect of Article 7 upon the status of individual employment cannot possibly be subject to grievance or arbitration, inasmuch as the status of such agreements is expressly excluded from grievance and arbitration. There is not a word in the entire Agreement which would support the position taken in the second issue which you have posed. You have heretofore advanced this theory unsuccessfully to the General Counsel of the National Labor Relations Board. You will no doubt urge it again in the impending hearing on the complaint issued by the General Counsel.

* * *

In Respondent's answer to the complaint, it raised three affirmative defenses based upon the above. In the first two "special defenses," Respondent asserted, almost *in haec verba*, the two positions set forth above, which would have required the Board to interpret the agreement, or find the defenses irrelevant. In its original brief, as previously noted, Respondent has withdrawn these two defenses. In Respondent's "Third Separate Special Defense," Respondent recites the fact that it has requested the Association and the Networks to arbitrate the two issues set forth, and concludes: "In view of the pendency of the above described arbitration proceedings, Respondent respectfully requests that the issues raised in the Second Consolidated Amended Complaint be deferred to arbitration and the Board retain jurisdiction pending the arbitral decision thereof."

Analysis and Conclusions

Under Section 8(b)(1)(B) of the Act it is an unfair labor practice for a labor organization "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The Board, in a series of cases, some of which are discussed in *Florida Power & Light Co. v. IBEW Local 641, supra,* has previously held that action by a union to restrain or coerce the performance of duties by supervisors who were or might be selected by their employers for the purposes of collective bargaining or adjustment of grievances violates that section of the statute. Thus it has been held that union threats to discipline supervisors for allegedly violating bargaining agreements or asserted practices or policies of the union, charges brought by a union against such supervisors, trials

held, and penalties levied against them for contravening the purposes and directives of the union were prohibited by this section of the law, on the ground that such action subverted the loyalties the employer was entitled to expect from the supervisor in the performance of his functions and deprived the employer of the supervisor whom the employer had selected—or potentially might select—to represent the employer for purposes of collective bargaining or adjustment of grievances. In the two cases considered by the Supreme Court in *Florida Power & Light,* the Board had held that union discipline of union-member supervisors who had crossed union picket lines and performed rank and file struck work during the strikes involved there thus violated Section 8(b)(1)(B)). The Court of Appeals for the District of Columbia, which considered these cases, disagreed. As stated by the Supreme Court (slip opinion, p. 7, footnotes omitted):

> In a 5-4 decision, the court [of appeals] held that
>
> "[S]ection 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank and file struck work," and accordingly refused to enforce the Board's Orders. Section 8(b)(1)(B), the court held, was intended to proscribe only union efforts to discipline supervisors for their actions in representing management in collective bargaining and the adjustment of grievances. It was the court's view that when a supervisor forsakes his supervisory role to do work normally performed by nonsupervisory employees, he no longer acts as a managerial representative and hence no longer merits any immunity from

discipline" 487 F.2d at 1157. We granted certiorari, 415 U.S. ...., to consider an important and novel question of labor law.

The Supreme Court itself affirmed the Court of Appeals by a vote of 5-4, holding that the legislative history of the pertinent amendments to the Act made it clear that in enacting Section 8(b)(1)(B), "Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment" (slip op. p. 13), and not with the general problem of the supervisor's conflict of loyalty as between his employer and his union. As the Supreme Court said (slip op. p. 14, emphasis in original):

> Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of §8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

The Court then noted that in the cases before it (*Florida Power & Light* and *Illinois Bell*) "it is certain that these supervisors were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto, when they crossed union picket lines

during an economic strike to engage in rank and file struck work." (Slip op. p. 15)

The Court concluded, "for these reasons, we hold that the Respondent unions did not violate Section 8(b)(1)(B) of the Act when they disciplined their supervisor-members for performing rank and file struck work." (Slip op. p. 23)

In coming to this conclusion, the Court also noted that the result was not inequitable, inasmuch as it derived from the options exercised 1) by the employers in recognizing the unions as representatives of these supervisors under the union contracts, and 2) by the supervisors in becoming and remaining members of the unions for their own benefit. As to the supervisors, the Court stated, in pertinent part (Slip op. pp. 21-22, citations omitted):

> There can be no denying that the supervisors involved in the present cases found themselves in something of a dilemma, and were pulled by conflicting loyalties. But inherent in the option afforded the employer by Congress, must be the recognition that supervisors permitted by their employers to maintain union membership will necessarily incur obligations to the union. . . . And, while both the employer and the union may have conflicting but nonetheless legitimate expectations of loyalty from supervisor-members during a strike, the fact that the supervisor will in some measure be the beneficiary of any advantages secured by the union through the strike makes it inherently inequitable that he be allowed to function as a strikebreaker without incurring union sanctions.

> The supervisor-member is of course not bound to retain his union membership absent a union security clause, and if, for whatever reason, he chooses to resign from the union, thereby relinquishing his union benefits, he could no longer be disciplined by the union for working during a strike. . . .
>
> In these cases, the supervisors' dilemma has been somewhat exaggerated . . . in *Illinois Bell,* the company did not command its supervisors to work during the strike and expressly left the decision to each individual. Those who chose not to work were not penalized and some were in fact promoted by their employer after the strike had ended. Those who did work during the strike but performed only their regular duties were not disciplined by the union. In *Florida Power,* the record does not disclose whether the supervisors crossed the picket lines at the company's request or not, but in any event, the union did not discipline those who did so only to perform their normal supervisory functions.

Similarly, in *N.L.R.B. v. San Francisco Typographical Union No. 21, etc. (California Newspapers, Inc.)* 486 F.2d 1347 (also relied upon by Respondent), where the Board had found the union there involved had violated Section 8(b)(1)(B) by disciplining supervisor-members for crossing the union's picket lines, the Court held that "the Board's broad interpretation of Section 8(b)(1)(B) . . . is an unjustifiable extension of the limited language of Section 8(b)(1)(B). Had the members elected to resign from the union, the power of the Union over them would have ended.

> [Citation omitted] But here the members remained in the Union, and therefore continued to be subject to their obligations as members." The Court also noted that although those disciplined were supervisors, "the Union did not punish them for exercising any management duty." (486 F.2d at 1349-50)

Compare *Scofield v. N.L.R.B.*, 394 U.S. 423, where, in the course of holding that Section 8(b)(1)(A) did not proscribe a union's enforcement of productivity ceilings through the discipline of members, the Supreme Court stated (at p. 430), ". . . Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule.*" (Emphasis added.)

> In this case we are concerned with certain supervisory, executive, and managerial personnel (referred to as hyphenates) principally employed to perform functions *not* covered by Respondent's collective-bargaining agreements (which agreements provide for the conditions of employment and the recompense of writers who furnish certain writing services to the television and theatrical industries), but who are nevertheless members of Respondent and who on occasion may do work properly falling within the terms of those bargaining agreements. The case involves the attempts of Respondent to coerce and restrain those hyphenates from going to work in any capacity during the course of a strike by Respondent against the hyphenates' employers over the terms for renewal of Respondent's bargaining agreements. Respondent promulgated and distributed strike rules to all its members forbidding

the members to go to work in any capacity during the strike. These received wide publicity. These were further enforced by personal and written communications, and at Respondent's meetings with the hyphenates, to impress upon them that the strike rules applied to the hyphenates and would be enforced against them.[19] Some hyphenates who allegedly violated one or more of the strike rules were charged, tried before trial boards of Respondent, and when convicted were disciplined.

During this same period, Respondent also had and enforced a policy, well known to the hyphenates, under which Respondent refused to permit such hyphenate-members to resign from membership prior to or during the strike.

At the same time, many of the hyphenates, probably most, were obligated to perform their primary managerial and supervisory functions under personal service contracts with their employers. Prior to the strike the hyphenates were informed by their employers that they would be expected to fulfill their contracts and come in to perform their normal work during the strike. In some cases, perhaps most, these primary functions were also covered by collective-bargaining agreements with other labor organizations requiring that the hyphenates not engage in strikes. At least one or two such unions directed their hyphenate members to perform during the strike in accordance with that union's contract.

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[19]Originally one of the rules, later officially rescinded, provided for the perpetual ostracism of any hyphenate working during the strike, which would clearly have wrecked the further careers of such persons. The impact of the rule itself, as well as the indication of the implacable attitude which prompted it, were clearly coercive of the hyphenates' freedom of action.

It is clear, as has been found, that the normal performance of the hyphenates' primary functions involves the adjustment of employee grievances, and, in the case of producers on distant location, to engage in collective bargaining with labor organizations. Those hyphenates charged by Respondent with violation of its strike rules, who testified in this hearing or before Respondent's trial boards denied performing any writing function during the strike other than that which had been commonly agreed in the past to be permissible for hyphenates performing supervisory and managerial functions. Indeed, the employers had determined in advance not to require writing of the hyphenates who worked during the strike. Evidence was offered to Respondent by certain hyphenates to substantiate the fact that those hyphenates, though working during the strike, nevertheless did no writing. Respondent, indeed, points to no instance of any hyphenate doing any "rank and file" work during the strike. In its original brief, Respondent stated its position as follows, in pertinent part (Orig. brief pp. 11-12, emphasis in original):

> . . . we believe that the record here supports an inference that hyphenate Guild members who crossed picket lines necessarily performed services of a non-supervisory character which bring them within [the Court of Appeals' decisions in *Illinois Bell* and *California Newspapers*].
>
> . . . Virtually all of the hyphenate writers called as witnesses by General Counsel conceded that they performed only (a) through (h) writing functions which, upon their view, were not strike defeating because such services were outside the coverage of the Guild contract. . . .

. . . Rather, it is our contention that such writing falls within the prohibitions of [Respondent's strike rules] and that the scope of such rules was legally permissible. . . .

The permissible scope of the strike rules, as to hyphenates, can only be judged fairly in connection with the production activities of the struck employers which the Guild had the right to frustrate . . . the most critical service of the producers is the finding and participation in the hiring of writers . . . while this is a statutory supervisional function, nevertheless, in a strike situation the performance of this non-writing function requires the producer to be the active recruiter of strike-breaking writers. The average foreman union member in an industrial plant is not in a strike situation, normally called upon to act as the *principal recruiter of strike breakers.*

In order to perform under his producer contract, the hyphenate Guild member necessarily must place himself directly in direct opposition to the strike strategy of the Guild and, at the same time, be free from the normal discipline imposed upon strike-breakers. The matter of disloyalty arises from the continued performance of the hiring function itself.[20]

These arguments, however, do not meet the issue. The fact is that, according to the record, such writing as the hyphenates did during the strike was limited

[20]In its supplementary brief, Respondent states that while it considers the "record as a whole" supports a finding that "rank and file" work was done, its position is that *Florida Power* makes the finding "irrelevant" (Supp. brief p. 5).

to that commonly accepted in the industry as part of the managerial and supervisory function and thus was not rank and file work. I so find. Indeed, although a number of Respondent's strike rules forbade writing for struck employers, none of the hyphenates was charged with violating those rules. It was stipulated that Respondent's counsel, during the disciplinary hearings, was not concerned with what work the hyphenates did when working during the strike.

In its supplementary brief, Respondent argues that it would be difficult to determine in these cases what the supervisors did after they went to work during a strike, for the supervisors and employers would not likely cooperate. However, in the one instance in which Respondent's trial panel is shown to have requested evidence, it was supplied by the employer. In another instance the hyphenate supplied evidence voluntarily, without request. In one of the disciplinary trials there was testimony by a union member that when he returned to work after the strike, he found no writing that had been done by a hyphenate (with whom the member was closely associated) who had worked during the strike, the union member stating that he was satisfied that some writing had been done by an executive who was not a member of Respondent. From this it seems clear that if hyphenates working during the strike had performed rank and file work, Respondent had means for discovering it.

Though the evidence is sparse, the record indicates that during the strike, where the situation arose, the hyphenates dealt with grievances of employees who worked during the strike, or, in any event, were available to deal with such matters in their normal capacities when and if such grievances arose.

Further, it has long been established that an employer may legally employ replacements for striking employees during a strike (in union terminology "strikebreakers") see *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345. Thus action by managerial or supervisory employees in recruiting employees during a strike would manifestly fall within the normal functions of such persons. There is no evidence of which I am aware that any hyphenate performing as a producer during the strike (as argued by Respondent) recruited or hired a writer during the strike—for the most part the evidence is that such producers were involved with scripts already written and ready for production but if any such writer was recruited or hired by a producer, this was clearly a proper managerial or supervisory function.

Nor is it material, in the circumstances of this case, that by going in to work at managerial and supervisory functions during the strike, hyphenate-members frustrated Respondent's strike strategy, or provided the employers with more economic clout than they otherwise might have possessed. Respondent cannot deny the hyphenates the right to resign from membership, and thus be free of the obligations of membership, while at the same time argue that because the hyphenates continued to be members they cannot be "free from the normal discipline imposed upon strike breakers." It was well known among the hyphenates that Respondent would not permit them to resign prior to or during the strike. At least one hyphenate's attempt to resign from membership in Respondent during this period was rejected. It is, of course, not known how many hyphenates would have resigned if this had been an option available to them. It is inferred that at least those who went

back to work during the strike would have done so, and possibly others. The rights of the hyphenates and their employers are not reduced because the exercise of those rights might make Respondent's position more difficult.

The result of the strike would be of only problematical benefit to many of the hyphenates involved. Respondent's contracts did not cover the hyphenates' managerial and supervisory functions (as was the situation in *Florida Power*) and would have benefited the hyphenates only if they engaged in writing covered by the bargaining agreements. There was testimony from a number of hyphenates that they had done no substantial writing of such character for a considerable number of years. There is little indication that the hyphenates received other substantial benefits from their membership in Respondent, except that derived from being part of the writing community which provided significant contacts with writer-members of Respondent, a sense of pride in belonging to the organization, and, perhaps most important, providing the hyphenate with a wider range of capabilities and thus enhancing his usefulness to his employer.

It has been previously found that those hyphenates occupying the positions of Executive Producers, Producers, Associate Producers, Directors, Story Editors, Story Consultants, Script Consultants, Executive Story Editors and Executive Story Consultants, as considered hereinabove, are supervisors within the meaning of Section 2(11) of the Act selected by their employers to adjust grievances, and, in the case of the producer function, to negotiate agreements with labor organizations within the meaning of Section 8(b)(1)(B) of the Act. On the basis of the above discussion and the record as

a whole it is found that by issuing strike rules designed to compel such hyphenates from going to work during the strike called by Respondent, and by meetings, personal contacts, telegrams, and phone calls designed to restrain and coerce such hyphenates from going to work during the strike, Respondent restrained and coerced the hyphenates from performing managerial and supervisory services for their employers during the strike, including the adjustment of employee grievances and participation in collective bargaining, and thus coerced and restrained those employers in the selection of representatives for collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1)(B); that those hyphenates involved in this matter who worked during the strike performed managerial and supervisory functions including the adjustment of grievances on collective bargaining as required, and did not perform rank and file work; and that by charging, trying, and disciplining such hyphenates who worked during the strike in such circumstances, Respondent further coerced and restrained the employers in the selection of their representatives for the purposes of collective bargaining within the meaning of Section 8(b)(1)(B) of the Act. It is therefore found that Respondent, by the activities set forth above, violated Section 8(b)(1)(B) of the Act.

In coming to this conclusion, I have given careful consideration to Respondent's contention that the Supreme Court in *Forida Power*, not only disapproved of the Board's finding that a violation of Section 8(b)(1)(B) had occurred in those cases, but, by completely overturning the Board's rationale in those cases, in effect held that coercion, restraint and discipline of supervisor-members by a labor organization for working

during a strike cannot be held by the Board to violate the Act. I disagree. It is clear that Respondent's action in this case violated the plain meaning of the statute without the necessity of resort to statutory exegesis. To illustrate: A person performing the function of a director acts in a managerial or supervisory capacity, which normally includes the adjustment of grievances of actors, actresses, craft employees and others. One occupying the position of a producer normally has a similar capacity and similar duties with respect to employee grievances. In addition, if the film is being shot on distant location the producer has authority to negotiate on the spot agreements with local unions. Thus when Respondent prevented or sought to prevent, such hyphenate members from going to work in their managerial and supervisory capacities as producers and directors during the strike, Respondent obviously coerced and restrained their employers in the selection of those specific producers and directors for the purpose of collective bargaining and the adjustment of grievances of employees working during the strike within the plain meaning of the statute. Similarly, those persons employed as story editors or in like classifications perform executive functions normally, and appear to have done so during the strike, in which the record indicates they were engaged as supervisors and actual or potential representatives of their employers for the adjustment of grievances.[21] Respondent, by coercing or restraining persons in these classifications from going in to do their normal work thereby actually coerced and

[21] As previously noted, two executive story editors, Paris and Trapnell, appear to have worked as executives during the strike. According to the disciplinary transcript, Trapnell is a supervisor over story analysts who apparently did not strike.

restrained their employers from selecting those persons as the employers' representatives for the adjustment of grievances and for collective bargaining during the strike.

The General Counsel also contends that Respondent's rule restricting the right of hyphenate-members to resign from membership should also be found to violate the Act. This raises what seems to me a quite important and difficult issue, one which may well have different consequences for supervisors as distinguished from rank and file employees.[22] I do not, however, have to determine these matters in this case. The General Counsel did not allege this matter as a violation of the Act in his complaint, nor put it properly in issue during the hearing. In the circumstances, I do not pass upon the issue.

Lastly, I have carefully considered Respondent's contention that certain issues should be referred to arbitra-

[22]As to the rank and file employees, since they are compelled by law to accept labor organizations chosen by the majority in the unit, and may be compelled to join or assist such unions even if violently opposed to them, and to comply with their rules even if personally obnoxious to the employees involved, it may well be argued that such employees should be afforded reasonable opportunity at proper times to resign their membership in such organizations and escape the imposition of such rules. Some commentators who have considered the subject indicate that this is a likely direction of the law. See *Restrictions on the Right to Resign: Can a Member's Freedom to Escape the Union Rule Be Overcome by Union Boilerplate?*, 42 Geo. Wash. L. Rev. 397 (1974); 26 Vand. L. Rev. 837 (1973); *Union Disciplinary Fines and the Right to Resign*, 30 Wash. & Lee L. Rev. 664 (1973); 5 St. Mary's L. J. 176 (1973); 40 Geo. Wash. L. Rev. 330 (1971). There may be, as the Court of Appeals for the First Circuit has indicated, ". . . a limit of reasonableness beyond which a union may not be permitted to go in holding captive its members." See *N.L.R.B. v. Int'l Union, U.A.W.*, 297 F.2d 272, 276 (1961).

tion and the complaint in this proceeding be dismissed. I have determined that this contention should be denied for the following reasons:

1. The parties have not agreed that the issues presented by the complaint in this matter should be determined by arbitration. The bargaining agreements held by Respondent which expired on or about March 4, or shortly thereafter, contain no restriction upon Respondent's issuance of strike rules, or upon its right to restrain members to comply with its rules, or upon Respondent's right to discipline its members, or upon Respondent's right to strike when it did. Respondent, indeed, does not claim that there were any contractual provisions which forbade or approved of such actions. It does claim that there was a contractual provision which would have protected the hyphenates if they desired to respect Respondent's picket line.[23] The employers, on their part, refer to provisions of the agreements in support of their contentions that the agreements do not cover or apply to the functions performed by the hyphenates, and further that these provisions of Article 7 are specifically exempted from arbitration. There is no need to consider the merits of these contentions. We are not here concerned with whether there was agreement that these hyphenate-

[23]Section 2 of Article 7 in certain expired agreements provided, in pertinent part, that "If, after the expiration or other termination of the effective term of this Basic Agreement, the [Respondent] shall call a strike against any Company, then each respective current employment contract of writer members of [Respondent] (hereinafter . . . referred to as 'members') with such Company shall be deemed automatically suspended, both as to service and compensation, where such strike is in effect, and each such member of [Respondent] shall incur no liability for breach of his respective employment contract by respecting such strike call . . ."

members of Respondent could respect Respondent's picket lines or its strike call with impunity from action by the employers, but we are concerned with whether the Respondent may legally restrain and coerce the hyphenate-members from going to work, at the insistence of their employers, to perform functions not covered by Respondent's contracts, and whether Respondent may discipline such members for going to work in such circumstances. No contractual basis appears and Respondent points to none which would authorize an arbitrator to pass on such issues.[24]

Assuming, without deciding, that the employers had agreed to absolve Respondent's hyphenate-members of all liability for breach of their personal services contracts (which, as noted, the employers vigorously dispute), it does not follow, as Respondent argues, that the employers thereby agreed not to ask, direct, or insist that such members come in to work, or agreed that the employers would not select such members as their representatives for adjustment of grievances or collective bargaining, or that the employers agreed that Respondent could restrain or coerce the members not to work, or, if the members did come in to work at the employers' insistence, that Respondent could discipline the members for doing so.

2. There is substantial doubt that Respondent's actions which are the basis for the complaint in this

[24]Cf. *Houston Mailers Union No. 36, etc.* (*Houston Chronicle*), 199 NLRB No. 36, relied upon by Respondent, in which the Board held that where the employer and the union there involved had specifically agreed in their bargaining agreement that the union "shall not discipline the foreman," and where the only issue before the Board concerned discipline of a foreman by the union, the Board deferred to the arbitration process in accordance with the bargaining agreement of the parties.

matter are subject to arbitration in any event. Almost all of Respondent's conduct with which we are here concerned, including the charges against the hyphenates, the disciplinary trials and the penalties imposed, occurred after the termination of the bargaining agreements and at a time when neither Respondent nor the employers had consented to arbitration of their actions.

3. The legal issues involved in this proceeding are matters of importance to the administration of the Act, as shown by the Supreme Court's recent decision in *Florida Power*. The application of the principles laid down in that decision and the development of the law in this area should be made by the Board in an unified and consistent fashion, and not delegated to the diverse opinions of various arbitrators who have neither been selected to administer the Act nor sworn to do so. This matter is highly complex and involves many factual and legal issues having little or no relation to contractual questions. The parties have spent much time litigating these issues and at considerable expense. It would seem to me an act of administrative abnegation of duty to tell the parties to start over again before another tribunal when the proceeding has already been tried before the agency appointed by Congress to hear and decide the issues.

Conclusions of Law

1. The employer members of the Association of Motion Picture and Television Producers, Inc., American Broadcasting Companies, Inc., Columbia Broadcasting Systems, Inc., National Broadcasting Company, Inc., and QM Productions (herein collectively referred to as "the employers") are, and each of them is,

an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. Writers Guild of America, West, Inc. ("the Respondent") is a labor organization within the meaning of Section 2(5) of the Act.

3. By restraining and coercing the employers of hyphenate-members of the Respondent, and each of the employers, in the selection of their representatives for the purpose of collective bargaining or the adjustment of grievances, as found hereinabove, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(b)(1)(B) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The record is convincing that Respondent, well aware of the primary supervisory, management, and executive functions of its hyphenate-members, drafted its strike rules and enforced them with the intent of compelling those hyphenate-members from going to work during the strike, without regard to the capacity in which they performed or the work done. In particular, by threatening to blacklist in perpetuity such hyphenates who worked during the strike, the rules threatened to drive those hyphenates out of the industry. Though

the mandatory effect of the rule was rescinded (see Resp. Exh. 11), there are other indications that Respondent's actions encourage a voluntary blacklist. Thus, in its letter to members explaining their options on appeals from penalties imposed upon certain hyphenates who worked, Respondent stated, *inter alia*, "There is obviously a stigma attached to expulsion which might cause individual members of the [Respondent] to refrain from working for such a person. The Guild itself cannot order its members to refrain from working with an individual merely because he was expelled." (Resp. Exh. 12) In at least one instance, in the disciplinary transcript relating to Robert Blees, a writer-member of Respondent expressed his intent not to work with Blees because the latter had worked during the strike, though the writer-member acknowledged that he was under no compulsion from Respondent to take that position. I fully realize that this member as well as others might have adopted this position even if Respondent had not suggested it by its rule and other communications and publicity. However, the fact is that Respondent did suggest it, and it is now impossible to disentangle the consequences flowing from its actions. I shall recommend a broad order in order to restore the *status quo* and remedy the various effects of Respondent's actions found to have violated the Act.

The General Counsel and the Charging Parties have requested a number of particular remedies, some of which I find appropriate in the circumstances and have included in the following order. It is requested that the fines, suspensions, and expulsions from membership of the hyphenates be rescinded and revoked. In the ordinary case I would be loath to hold that a union may not suspend or expel a member who

worked during a legal strike. However, here, where the hyphenates have been forced to undergo the stigma of suspension or expulsion by Respondent's deliberate action in refusing them a free choice to withdraw in a normal manner prior to working during the strike, and where Respondent has further suggested that members not work with hyphenates who were expelled, I am convinced that the effects of Respondent's actions can best be remedied by restoration of the *status quo ante*. It is also noted that in the four cases in which appeals were perfected, Respondent's membership rejected the penalties of suspension or expulsion. Inasmuch as the record is incomplete as to the status of the other hyphenates charged, I shall recommend the normal remedial order as to all, without distinction between those whose suspension or expulsion has already been revoked and those for whom it has not.

It is also requested that Respondent be ordered to mail a copy of the notice to each of its members and to publish the notice in the local trade papers, "Hollywood Reporter" and "Daily Variety", as well as in local papers of general circulation. The record shows that Respondent was careful to mail its strike rules, directions, orders and instructions to all its members in order to give those actions wide and personal service; and further that the matter of compulsion of the hyphenate-members to abide by Respondent's rules and the trials of those members and the penalties imposed upon them was given wide publicity in the trade papers and the local press through press releases and other information supplied by Respondent and its officers. The request that equal publicity be given to the Board's notice is clearly justified. However, I believe that this can be accomplished through re-

quiring Respondent to publish the Board's notice in the two trade papers for one week (six consecutive issues). I do not think that it is necessary that the notice be published by Respondent in the local press, or that the publication in the trade papers be for three consecutive weeks as requested. I further do not agree, as has been requested, that there is any necessity that the notice be read at Respondent's membership meetings, in addition to the normal posting of the notice, and the mailing and publication just considered.

There is a further request that Respondent be ordered to reimburse those hyphenates who were brought to trial for violating Respondent's strike rules for the reasonable expenses of defending their conduct in their trials. A persuasive argument can be made on the point. There is no question but that Respondent deliberately used the difficult position of the hyphenates in a power play against the employers. However, the hyphenates are not entirely without responsibility in the result; for whatever their reasons, they had maintained membership in Respondent until the very last minute. There is also no evidence that Respondent did not sincerely believe that it had the right to do as it did. While sincerity does not excuse violation of the law, it has weight in considering an unusual remedy such as that requested. I do not believe that this remedy is justified in these circumstances.

Upon the foregoing findings of fact, conclusions of law and the entire record, I issue the following recommended:[25]

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[25]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor

(This footnote is continued on next page)

ORDER

Writers Guild of America, West, Inc., the Respondent herein, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing any employer in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances:

(1) by issuing rules, orders, directions or instructions in any form to any supervisor, executive or other management personnel whose functions involve or may involve collective bargaining or the adjustment of grievances not to perform supervisory, managerial or executive functions for such employer, or

(2) by threatening any such employer representative with fines, suspension or expulsion from membership, blacklisting, obstracism, or any other penalty or reprisal for performing supervisory, managerial or executive functions for such employer, or

(3) by citing or charging any such employer representative with violation of any such rule, order, direction or instruction, or by summoning any such employer representative before any committee, board, panel, or tribunal to be tried for, or by trying any such employer representative for violation of any such rule, order, direction or instruction forbidding such representative from performing supervisory, executive, or managerial functions, or

(4) by fining or otherwise disciplining such employer representatives for performing supervisory, executive, or managerial functions, or

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Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(5) by enforcing in any other manner any such rule, order, direction, or instruction.

(b) In any like or related manner restraining or coercing any employer in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Revoke, rescind, and expunge from Respondent's records, the fines, suspensions, or expulsions from membership, or other disciplinary action, or penalty imposed upon Hugh Benson, Robert Blees, Cy Chermack, Jon Epstein, David Levinson, John T. Mantley, Herman S. Saunders, David Victor, Robert A. Cinader, Barry Crane, or upon any other employer representative as described in paragraph 1.(a)(1) above, for working during the strike beginning on or about March 4, 1973, as a supervisor, executive, or in a managerial capacity.

(b) Reimburse Hugh Benson, Robert Blees, Cy Chermack, Jon Epstein, David Levinson, John T. Mantley, Herman S. Saunders, David Victor, Robert A. Cinader, and Barry Crane, and any other employer representative as described in paragraph 2(a) above, for the fines levied against them, with interest thereon at 6 percent per annum.

(c) Advise Hugh Benson, Robert Blees, Cy Chermack, Jon Epstein, David Levinson, John T. Mantley, Herman S. Saunders, David Victor, Robert A. Cinader,

and Barry Crane, and any other employer representative as described above, in writing, that any fines levied against them, and any action suspending or expelling them from membership in the Respondent, or any other penalty imposed upon them for working during the said strike, has been revoked and rescinded, and that such fines and suspensions or expulsions, or other penalties have been expunged from Respondent's records.

(d) Post at its office and meeting halls copies of the notice attached, marked "Appendix."[28] Copies of said notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Mail a signed copy of the attached notice marked "Appendix" to all Respondent's members to whom Respondent's strike rules dated February 20, 1973, were mailed.

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[28]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENPORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Publish the attached notice marked "Appendix" for one week (6 consecutive issues) in "Hollywood Reporter" and "Daily Variety," immediately after posting said notice.

(g) Notify the Regional Director for Region 31, in writing, within 20 days from the date of the receipt of this Decision, what steps have been taken to comply herewith.

Dated at Washington, D.C.

/s/ Sidney J. Barban
Sidney J. Barban
Administrative Law Judge

Form NLRB—4726.

NOTICE TO
MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE
UNITED STATES GOVERNMENT

WE WILL NOT restrain or coerce any employer in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances

(a) by ordering, directing, or instructing any such representative not to perform supervisory, executive or managerial functions for an employer, or

(b) by threatening any such representative with fines, suspension or expulsion from membership, blacklisting, or any other penalty for performing supervisory, executive or managerial functions, or

(c) by charging, trying, or penalizing any such representative for working as a supervisor, executive, or in a managerial position.

WE WILL NOT in any like or related manner restrain or coerce any employer in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL rescind and revoke, and expunge from our records any fine, suspension or expulsion from membership or any other penalties to the extent previously imposed on the following persons or on any other representative of an employer for the purpose of collective bargaining or the adjustment of grievances who worked as a supervisor, executive, or in a man-

agerial position during the strike which began on or about March 4, 1973:

Hugh Benson
Robert Blees
Cy Chermack
Robert A. Cinader
Barry Crane
Jon Epstein
David Levinson
John T. Mantley
Herman S. Saunders
David Victor

WE WILL reimburse the persons named and described above for any fines imposed upon them for working during the strike which began on or about March 4, 1973, with interest thereon at 6 percent per annum.

WRITERS GUILD OF AMERICA,
WEST, INC.
(Labor Organization)

Dated .....By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST
NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, Calif. 90024, Telephone (213) 824-7351.

APPENDIX B.

Decision and Order.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Writers Guild of America, West, Inc.	)	Cases 31-CB-1203-2, and 31-CB-1316,
and	)	
Association of Motion Picture and Television Producers, Inc.[1]	)	
and	)	Cases 31-CB-1223, and 31-CB-1313, and
American Broadcasting Companies, Inc.	)	
Columbia Broadcasting System, National Broadcasting Company, Inc.[2]	)	
and	)	Case 31-CB-1355
QM Productions	)	

On September 18, 1974, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions[3] and a supporting brief, and Charging Parties Networks and the Association filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1]Hereinafter referred to as the Association.

[2]Hereinafter referred to as the Networks.

[3]In its brief to the Board, Respondent withdrew its contention that certain issues should be deferred to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971). Accordingly, that issue is not before the Board for resolution.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith, and to adopt his recommended Order.

1. The Administrative Law Judge found violations of Section 8(b)(1)(B) only with respect to the "hyphenates"[4] in the producer, director, and story editor classifications because the record showed that, except for Jerome Bredouw, all of the persons who were both charged and tried by the Union occupied those positions. With respect to Jerome Bredouw, he found that the charges against Bredouw were dismissed after trial, and that no penalty was assessed against him. The Administrative Law Judge therefore concluded that it was unnecessary to consider alleged violations as to those hyphenates in other classifications,[5] and he therefore did not resolve these additional allegations

[4]"Hyphenates" is a term applied to persons who are writers but possess the ability to perform in more than one capacity, such as producing, directing, or editing for their employers in the industry. We affirm the Administrative Law Judge's findings that hyphenates who are also producers, directors, and story editors are supervisors within the meaning of Sec. 2(11) of the Act.

[5]Included in these classifications are vice presidents for program production, vice presidents for production, vice presidents for program development, general programming executives, managers of film programs, and executives. Although the Administrative Law Judge made no finding on the supervisory status of persons occupying these positions, we find it necessary to do so. The record clearly reflects that persons in these classifications engage in hiring and are representatives, or potential representatives, of their employers in the adjustment of grievances. Accordingly, we conclude that persons occupying the above positions are supervisors and representatives of their employers within the meaning of Secs. 2(11) and 8(b)(1)(B) of the Act.

in the complaint. The Association and the Networks, two of the Charging Parties herein, except to this omission for reasons we deem meritorious.

There is no question that, although only some of the hyphenates were brought to trial and actually fined or disciplined for crossing the picket line, all of the hyphenates named in the complaint were threatened with similar discipline and adverse action if they crossed the picket line to go to work. There is also no question that when Respondent threatened the hyphenates, Respondent was determined to enforce its threats without regard to the fact that the Charging Parties uniformly followed a policy during the strike not to require hyphenates to perform any unit or struck work. Furthermore, if it had any doubt at all, Respondent could easily have ascertained whether any struck work was in fact performed by comparing dated scripts to the final film production. As we find that Section 8(b)(1)(B) proscribes the disciplinary action here taken against some hyphenates[6] (but only threatened against others), it would seem to follow, and we further find, that the proscription also encompasses the threat to take the prohibited disciplinary action,[7] therefore sustain the complaint's alleged violations of Section 8(b)(1)(B) of the Act, *in toto*.

[6]*Chicago Typographical Union No. 16 (Harmmond Publishers, Inc.)*, 216 NLRB No. 149 (1975); *New York Typographical Union No. 6, International Typographical Union, AFL-CIO (Daily Racing Form, a Subsidiary of Triangle Publishers, Inc.*, 216 NLRB No. 147 (1975).

[7]*Local 423, Laborers' International Union of North America, AFL-CIO (Mansfield Flooring Co., Inc.)*, 195 NLRB 241 (1972); *International Union of Operating Engineers, Local 406, AFL-CIO (New Orleans Chapter, Associated General Contractors of America, Inc.)*, 189 NLRB 255, 265 (1971); *United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Association, Local No. 220 (Jones and Jones, Inc.)*, 177 NLRB 632, 653 (1969).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Writers Guild of America, West, Inc., Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. May 13, 1975.

Howard Jenkins, Jr.,
Member
John A. Penello,
Member
NATIONAL LABOR
RELATIONS BOARD

(Seal)

MEMBER FANNING, dissenting:

For the reasons stated in my dissenting opinion in *Triangle Publications, Inc.*, 216 NLRB No. 147, I would dismiss the complaint. I wish to point out, once again, that the Supreme Court has, in *Florida Power & Light Co.*,[8] indicated that Section 8(b)(1)(B) was designed for the sole and limited purposes of preventing labor organizations from forcing employers into multiemployer bargaining negotiations and from dictating to employers whom they should select to represent them during grievance adjustment procedures and/or collective-bargaining sessions. Our prior "evolutionary" approach[9] to this section of the Act having thus been rejected by the Supreme Court, it is obvious that the very narrow thrust accorded the section in its early years must be reconstituted as its current thrust. Whatever the wisdom of Respondent's course of action herein, the plain fact is that its actions are not, in my view, proscribed by the section upon which the General Counsel relies. I thus dissent.

Dated, Washington, D.C. May 13, 1975.

John H. Fanning,
Member
NATIONAL LABOR
RELATIONS BOARD

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[8] *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790 (1974).

[9] For a discussion of the history of Section 8(b)(1)(B) see *id.* at 798-805.

D—9835

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT restrain or coerce any employer in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances:

(a) by issuing rules, orders, directions, or instructions in any form to any such employer representative not to perform supervisory, executive, or managerial functions for an employer, or

(b) by threatening any such employer representative with fines, suspension, or expulsion from membership, blacklisting, ostracism, or any other penalty or reprisal for performing supervisory, executive, or managerial functions, or

(c) by charging or trying any such employer representative for performing supervisory, executive, or managerial functions, or

(d) by fining or otherwise disciplining any such representative for performing supervisory, executive, or managerial functions, or

(e) by enforcing in any other manner any such rule, order, direction, or instruction.

WE WILL NOT in any like or related manner restrain or coerce any employer in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL rescind and revoke, and expunge from our records, any fine, suspension, or expulsion from membership or any other penalties to the extent previously imposed on the following persons, or on any other representative of an employer for the purpose of collective bargaining or the adjustment of grievances, who worked as a supervisor, executive, or in a managerial position during the strike which began on or about March 4, 1973, and advise such persons of this action:

Hugh Benson
Robert Blees
Cy Chermack
Robert A. Cinader
Barry Crane
Jon Epstein
David Levinson
John T. Mantley
Herman S. Saunders
David Victor

WE WILL reimburse the persons named and described above for any fines imposed upon them for working during the strike which began on or about March 4, 1973, with interest thereon at 6 percent per annum.

WRITERS GUILD OF AMERICA,
WEST, INC.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 12100 Federal Building, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213—824—7351.

APPENDIX C.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 604, 1161—September Term, 1975.
(Argued May 10, 1976 Decided November 22, 1976.)

American Broadcasting Companies, Inc., CBS, Inc., and National Broadcasting Company, Inc., *Petitioners,* and Association of Motion Picture and Television Producers, Inc., *Intervenor,* v. National Labor Relations Board, *Respondent.*	)	No. 75-4089
National Labor Relations Board, *Petitioner,* and American Broadcasting Companies, Inc., CBS, Inc. and National Broadcasting Company, Inc., *Intervenors,* v. Writers Guild of America, West, Inc., *Respondent.*	)	No. 75-4121

Before: Moore and Timbers, *Circuit Judges,* and Newman, *District Judge.**

*Hon. Jon O. Newman, United States District Judge, District of Connecticut, sitting by designation.

Petition to review, and application to enforce, order of National Labor Relations Board, 217 N.L.R.B. No. 159 (1975), requiring a labor union to cease and desist from certain conduct during a four month strike in the spring of 1973 which the Board found to be in violation of Section 8(b)(1)(B) of the National Labor Relations Act and to take certain affirmative action to remedy the violations.

Enforcement denied.

John G. Elligers, Atty., NLRB, Washington, D.C. (John S. Irving, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Elliott Moore, Deputy Assoc. Gen. Counsel, NLRB, Washington, D.C., on the brief), *for Petitioner-Respondent National Labor Relations Board.*

Richard N. Fisher, Los Angeles, Cal. (Steven C. Babb, and O'Melveny & Myers, Los Angeles, Cal., on the brief), *for Petitioners-Intervenors American Broadcasting Companies, Inc., CBS, Inc.*, and *National Broadcasting Co., Inc.*

Harry J. Keaton, Los Angeles, Cal. (Andrew B. Kaplan, and Mitchell, Silberberg & Knupp, Los Angeles, Cal., on the brief), *for Intervenor Association of Motion Picture and Television Producers, Inc.*

Julius Reich, Los Angeles, Cal. (Reich, Adell & Crost, and Selvin & Weiner, Los Angeles, Cal., on the brief), *for Respondent Writers Guild of America, West*, Inc.

Per Curiam:

On this petition to review by the networks (American Broadcasting Companies, Inc., CBS, Inc., and National Broadcasting Company, Inc.), and an application by the National Labor Relations Board to enforce, an order of the Board, 217 N.L.R.B. No. 159 (1975), requiring the union (Writers Guild of America, West, Inc.) to cease and desist from certain conduct during a strike found to be in violation of Section 8(b)(1)(B) of the National Labor Relations Act and to take certain affirmative action to remedy the violations, we find the essential issue to be whether as a matter of law the Board correctly applied Section 8(b)(1)(B) in concluding that the union restrained and coerced the employers by threatening to blacklist and discipline and by fining and expelling from membership certain supervisory personnel who crossed the picket lines during a strike.

For substantially the reasons set forth in the dissenting opinion of Board Member John H. Fanning, 217 N.L.R.B. No. 159, we hold that the Board as a matter of law incorrectly applied Section 8(b)(1)(B) to the instant case and we deny enforcement of the Board's order. See *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790 (1974).

Enforcement denied.

Moore, *Circuit Judge* (Dissenting):

I cannot join in the conclusion of the majority that enforcement should be denied because in my opinion the facts and the law clearly call for an opposite result, *i.e.*, the granting of enforcement.

Briefly, three broadcasting companies, American Broadcasting Companies, Inc., CBS, Inc. and National Broadcasting Company, Inc., certain of their employees (writers of material for live, nationally-broadcast television programs), Writers Guild of America, West Inc. (the "Guild") and the National Labor Relations Board (the "Board") and an Intervenor are involved. In March 1973 the Guild called a strike. Many of the Guild's members were employees vested with supervisory and managerial functions. Certain of these employees crossed the Guild's picket lines. Against this group the Guild brought disciplinary proceedings which resulted in the imposition of fines and other sanctions. The name given to this category of employee, namely, supervisors or management representatives, is "hyphenate". Various hearings were held between May 21, 1973 and January 25, 1974 before an Administrative Law Judge ("ALJ") which resulted in a lengthy opinion, dated September 18, 1974, wherein he found that the Guild, by its actions, restrained and coerced the employees of Guild members who were hyphenates in the selection of their representatives for the purpose of collective bargaining or the adjustment of grievances. The ALJ order contained certain "cease and desist" provisions relative to any employee whose function involved supervisory or managerial tasks and enjoined disciplinary proceedings against such group by way of fines or otherwise.

When the matter came before the Board on the record, briefs and exceptions to the ALJ decision, a panel of the Board affirmed "the rulings, findings and conclusions of the Administrative Law Judge to the extent consistent herewith [its opinion]" and adopted the recommended ALJ order. A third member of this panel dissented. The Board sustained "the complaint's alleged violations of Section 8(b)(1)(B) of the Act [the National Labor Relations Act], *in toto*."

There is no disputed question of fact as to the threats and disciplinary action by way of fines against the hyphenates. This *in terrorem* action by the Guild would inevitably have an effect of inclining these employees towards their Unions in matters supervisory and managerial when they should have been free of any coercive influences.

The majority's reliance on *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790 (1974) is misplaced. In *Florida Power*, the Court of Appeals (487 F.2d 1143, 1157 [D.C. Cir., 1973]) stated:

> "When a supervisor acts as such he is a representative of management, and as such he should be immune from union discipline. The unions participating in the present cases conceded as much at oral argument when they agreed that when a supervisor crosses a picket line to perform *supervisory* work, he remains immune from discipline." (Emphasis in original)

In the Supreme Court, the Court made it clear that there is a definite cleavage between supervisory work and "rank-and-file" work, and stated:

"The question to be decided is whether the unions committed unfair labor practices under §8(b)(1)(B) when they disciplined their supervisor-members for crossing the picket lines and *performing rank-and-file struck work* during lawful economic strikes against the companies." (Emphasis added) 417 U.S. at 792.

The basis of the Supreme Court's decision was made even clearer when it stated:

"The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of §8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." 417 U.S. at 804-5.

The Court of Appeals should not usurp the function of the ALJ and Board unless there is a complete absence of evidence to support its findings. Both concluded that the hyphenates were *bona fide* supervisors and had managerial functions. Since there is more than adequate proof to support these findings, I would enforce the Board's order.

APPENDIX D.

New York Typographical Union No. 6, International Typographical Union, AFL-CIO and Daily Racing Form, a Subsidiary of Triangle Publications, Inc. Case 22-CB-2345.

March 6, 1975

SUPPLEMENTAL DECISION

By Members Fanning, Jenkins, and Penello

On October 5, 1973, the Board issued a decision[1] in the above-entitled proceeding in which it affirmed the rulings, findings, and conclusions of the Administrative Law Judge, as contained in his Decision of June 27, 1973, and ordered that the Respondent take the action set forth in the recommended Order of the Administrative Law Judge.

Thereafter, on July 30, 1974, the Board advised the parties of its decision, *sua sponte*, to reconsider the decision in the above-entitled proceeding in light of the Supreme Court's decision in *Florida Power and Light Co.*[2] Subsequently, the Board invited statements of position from the parties. Only the General Counsel responded and submitted such a statement.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] 206 NLRB 294 (1973).

[2] *Florida Power and Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790 (1974).

The Board has duly considered the matter and has decided, for the reasons set forth below, to reaffirm its prior conclusion that the Respondent violated Section 8(b)(1)(B) of the Act by fining and expelling from membership its member, Flood, who was also a company supervisor, for working behind the Respondent's picket line.

In our previous decision, we found that Flood, as well as all employees at the plant, continued to work throughout the Respondent's strike of the Company's plant. The record established, and it was undisputed, that "at all times" during the strike Flood continued to perform his normal supervisory duties. Flood's duties as production manager included overall responsibility for, and supervision of, the Company's pressroom and composing room, adjustment of employee grievances and complaints and participation on a three-man negotiating team which was responsible for negotiating collective-bargaining agreements with Typographers Local 71 and Lithographers and Platemakers Local No. 1, which represented the Company's composing[3] and pressroom employees, respectively. Flood was disciplined by the Respondent for having violated its rules "by working behind the Union's picket line."

In *Florida Power and Light, supra,* the Supreme Court held that whether or not a union violates Section 8(b)(1)(B) by disciplining a supervisor-member depends on whether that discipline may adversely affect

[3]Respondent, a sister local to Local 71, did not represent these employees, although it claimed jurisdiction over the Company's composing room and that the Company was performing struck work. Flood was one of the few, if not the only, individual employed at the struck plant who was a member of Respondent at the time of the strike.

the supervisor's performance of his 8(b)(1)(B) duties. Thus, the Court said:

> The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of 8(b)(1)(B) *only when that discipline may adversely affect* that supervisor's conduct in performing the duties of, and acting in the capacity as, grievance adjuster or collective bargainer on behalf of the employer. [Emphasis supplied.]

In *Hammond Publishers, Inc.*,[4] a Board majority interpreted the Supreme Court's holding in *Florda Power and Light* to mean, *inter alia,* that in situations where the disciplined supervisor has engaged *"only* in the performance of supervisory activities (not limited to grievance adjustment or collective bargaining)," a union's disciplining of that supervisor violates Section 8(b)(1)(B) of the Act because "it is reasonably likely that an adverse effect will carry over to the supervisor's performance of his 8(b)(1)(B) duties. . . ." In so holding in *Hammond,* the Board focused on the type and amount of activities performed by the supervisor-member during the strike rather than, as urged by the dissent herein, on the union's professed reason for imposing the discipline.

We agree with the reasoning in *Hammond* and feel that it controls in the instant case since the disciplined supervisor-member herein performed only his normal supervisory duties during the strike. Our dissenting colleague feels, however, that the discipline in the instant case was not violative of Section 8(b)(1)(B).

[4]*Chicago Typographical Union No. 16 (Hammond Publishers, Inc.)*, 216 NLRB No. 149 (1975).

In so concluding, the dissent intimates that Section 8(b)(1)(B) is violated only where the discipline is directed toward the manner in which a supervisor performs his 8(b)(1)(B) duties, since it is asserted, only under such circumstances may the discipline adversely affect the supervisor's future performance of his 8(b)(1)(B) duties. Under the dissent's analysis, therefore, a union may legally discipline a supervisor-member for "crossing a picket line" or for "working during a strike," etc., even though the supervisor has performed *only* supervisory functions. Thus, under the dissent, a union may in effect tell a supervisor-member that he may not perform *any* functions, even grievance adjusting or collective bargaining, during a strike without running the risk of being disciplined. The reasoning of the dissent seems to be rooted in the conviction that a supervisor-member is acting as a "strikebreaker" and thus should be subject to union discipline if he performs *any* function during a strike. The justification for this analysis draws support from the dissent's assertion that the employer must pay this "price" for permitting supervisors to remain union members or for having neglected to incorporate a provision in the collective-bargaining agreement permitting supervisor-members to perform supervisory duties during a strike.

We do not believe that the Supreme Court's decision in *Florida Power* warrants the severe limitations which the dissent would impose on the scope of Section 8(b)(1)(B). The Supreme Court was not faced in *Florida Power* with the situation presented herein. In *Florida Power*, the Supreme Court dealt with union discipline of supervisor-members who crossed picket lines to perform rank-and-file struck work, not those who crossed picket lines to perform supervisory duties.

In fact the majority noted[5] that the supervisors who had performed only their regular duties during the strike had not been disciplined. As Mr. Justice White stated in the dissent:[6] "I do not read the Court to say that § 8(b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work, during a labor dispute."

Therefore, nothing in the Supreme Court's *Florida Power* decision dictates the conclusion, urged by the dissent, that a union has a right to discipline a supervisor-member who performs *any* function during a strike.[7] The most that can be said is that the Court sanctioned the disciplining of supervisor-members who performed rank-and-file struck work during a strike. In this same vein, it is apparent to us that it was the performance of rank-and-file struck work by supervisor-members which the Supreme Court referred to as strikebreaking for which union sanctions could be incurred.[8] Therefore, under our view of *Florida Power* and its definition of strikebreaking, the only so-called "price" that an employer must pay for

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[5]417 U.S. 790, 812 (1974), fn. 22.

[6]*Id.* at 815, fn. 2.

[7]As stated in the circuit court opinion in *Illinois Bell*, 487 F.2d 1143, 1157 (C.A.D.C., 1973), affirmed in *Florida Power*, *supra*: "When a supervisor acts as such he is a representative of management, and as such he should be immune from discipline. The unions participating in the present cases conceded as much at oral argument when they agreed that when a supervisor crosses a picket line to perform *supervisory* work he remains immune from discipline."

[8]417 U.S. 790, 812, fn. 22.

permitting a supervisor to be a union member, is that the supervisor-member cannot, with immunity, cross union picket lines to perform rank-and-file work.[9]

We believe that the adverse future effect which the Supreme Court referred to as violative in *Florida Power* is as likely to occur, regardless of a union's professed reasons or intent, if a supervisor-member is disciplined after having performed only his normal supervisory duties or if he is disciplined after having engaged in contract interpretation.[10] In the latter case it is the supervisor's future manner of contract interpretation which is likely to be influenced and in the former case it is the supervisor's actual future performance of supervisory duties, including grievance adjustment or collective bargaining, which is likely to be influenced. In either case the employer has been restrained in the selection of his 8(b)(1)(B) representative.

Accordingly, because Flood was performing only his normal supervisory duties which included handling

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[9]As stated by the circuit court in *Illinois Bell, supra,* 1169-70:

> If the employer, however, chooses not to exercise his rights under that section [14(1)], permits his supervisors to join unions . . . the employer cannot still insist on the supervisors' undivided loyalty in every union-employer dispute, no matter how unrelated the subject of that dispute is to the supervisory function. . . .
>
> * * *
>
> This is not to say, of course, that by permitting his supervisors to join unions the employer *completely* waives his right to their loyalty. Even if he permits them to join unions, Section 8(b)(1)(B), as interpreted by *Oakland Mailers* and *Meat Cutters,* immunizes them from union discipline imposed for the manner in which they perform their *supervisory* functions. [Emphasis supplied.]

[10]The Supreme Court assumed that this latter situation, which arose in *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB 2173 (1968), fell within the purview of its *Florida Power* ruling.

grievances and participating in the collective-bargaining process, we find, for the reasons stated above, that the Respondent violated Section 8(b)(1)(B) of the Act by fining and expelling Flood from membership for working behind its picket line. We, therefore, reaffirm our previous Decision and Order.

MEMBER FANNING, dissenting:

Section 8(b)(1)(B) of the Act makes it an unfair labor practice for a labor organization "to restrain or coerce . . . an employer in the *selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.*" (Emphasis supplied.)

The Supreme Court's analysis of Section 8(b)(1)(B) in *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*[11] now leads me to conclude that the statutory language of Section 8(b)(1)(B) means only what it says and no more. Because there is absolutely no evidence tending to establish that the Company herein was restrained or coerced in its selection of representatives for the purposes of collective bargaining or the adjustment of grievances, I dissent.

The basic defect in the majority's analysis is that it attempts to interpret *Florida Power & Light* at the expense of the history of Section 8(b)(1)(B). I do not believe a meaningful analysis of *Florida Power* is possible under such circumstances and therefore provide that history.

Section 8(b)(1)(B) was enacted, via the Taft-Hartley amendments, in 1947. Its legislative history irrefutably indicates, as the Supreme Court in *Florida*

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[11]417 U.S. 790 (1974).

Power recognized, that Congress intended, *solely* and *exclusively*, to prevent labor organizations from forcing employers to join or withdraw from multiemployer bargaining groups and to end the practice of some labor organizations at that time of dictating whom employers should select as bargaining or grievance adjustment representatives. As the Supreme Court pointed out, Senator Taft's remarks were illustrative:

> This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, "We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y." That has been done. It would prevent their saying to the employer, "You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work." This is the only section in the bill which has any relation to Nation-wide bargaining. Under this provision it would be impossible for a union to say to a company, "We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally." Under the bill the employer has a right to say, "No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with." I believe the provision is a necessary one, and one which will accomplish substantially wise purposes.[12]

For some 20 years after its enactment, the Board's view of the parameters of Section 8(b)(1)(B) substantially coincided with both the legislative history and

[12]93 Cong. Rec. 3950, 3953-54 (1947).

the statutory language.[13] It is true, as the Supreme Court has pointed out, that the Board's decision in *Oakland Mailers*,[14] decided in 1968, represented a quantum leap from the Board's initial view of the breadth of Section 8(b)(1)(B). That leap, however, was never intended, in my view, to propel the Board into the area of regulating the economic weaponry available to a labor organization during a strike. Rather it represented what is to my mind the reasonable recognition that labor organizations should not be permitted to accomplish indirectly that which they were proscribed from accomplishing directly. In the concrete terms of the decision in *Oakland Mailers*, it represented no more than the view that the respondent therein, by disciplining various supervisor-members for the manner in which they interpreted the contract, and by threatening to discipline supervisor-members because of disagreements involving contract interpretation and grievance adjustment, had violated Section 8(b)(1)(B) even though no direct pressure designed to seek the supervisors' removal had been placed on the employer. Significantly, especially in terms of the instant case, we stated in distinguishing *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*:[15]

> [That] case involved a union's fining of its members for crossing picket lines. *The primary relationship there affected was the one between the union*

[13]See, e.g., 417 U.S. at 799, fn. 10, and accompanying text. In fact, up until 1960 only 11 cases had arisen under Sec. 8(b)(1)(B). See brief of the Board at p. 16, *N.L.R.B. v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 284 F.2d 893 (C.A. 2, 1960).

[14]*San Francisco-Oakland Mailers Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB 2173 (1968).

[15]388 U.S. 175 (1967).

and its members, and the union's particular objective—solidarity in strike action—was deemed by the Supreme Court a legitimate area for union concern in the circumstances involved. In contrast, in the present case, the relationship primarily affected is the one between the Union and the Employer, since the underlying question was the interpretation of the collective-bargaining agreement between the parties.[16]

Oakland Mailers gave rise to a line of cases which further expanded the reach of Section 8(b)(1)(B).[17] Union discipline of supervisor-members became proscribed not merely when the nature of the dispute between union and supervisor involved the latter's performance of particular collective-bargaining or grievance adjustment functions but in all settings in which the supervisor was engaged in *any* supervisory or management function.

As the Supreme Court notes in *Florida Power* these cases in large part foreshadowed the cases to come before the Court in *Florida Power*. They introduced, primarily as justification for the expansion they evinced, the concept of "loyalty" and the role it played in the resolution of 8(b)(1)(B) issues. Supervisor-members could not, it was said, be disciplined for the manner in which they performed supervisory functions because such discipline "reasonably tends to derogate from the supervisor-member's complete loyalty to

[16]172 NLRB at 2174 (emphasis supplied). Why the perception that the union's fining of a member for crossing picket lines primarily affected the union-member relationship and not the union-employer relationship is cast aside by the majority in this case will, apparently, remain a mystery.

[17]See, e.g., 417 U.S. at 801, fn. 11, and cases cited in accompanying text.

management when called on to serve as a management representative."[18]

I participated in several of the cases in the line from *Oakland Mailers* to the cases discussed in *Florida Power*.[19] It is not necessary, at this juncture, to explore fully the effect *Florida Power's* treatment of them has had. They are, in any event, distinguishable from the instant case. In each and every such case from *Toledo Blade* to *Detroit Newspapers*,[20] the key to the legality of the union's discipline was the nature of the activity for which the supervisor was disciplined or threatened with discipline, and in each and every case the union's interest was not related in any way whatsoever to its substantial right to demand solidarity during a strike. In all such cases the supervisor-members were disciplined for the particular manner in which they performed a management function, not because they had failed to honor a picket line, and, while the justification for the Board's finding of violation in those cases can no longer be buttressed by so-called "loyalty" considerations, it is at least arguable that when a union's discipline is clearly *directed* at the manner in which a supervisor performs a function colorably related to grievance adjustment (e.g., suspension of an employee) or collective bargaining (e.g., contract interpretation), such discipline may have an adverse effect on the supervisor's future performance of those

[18]*Detroit Newspaper Printing Pressmen's Union 13, International Printing Pressmen and Assistants' Union of North America, AFL-CIO (The Detroit Free Press)*, 192 NLRB 106, 110 (1971).

[19]See, e.g., *id., Toledo Locals Nos. 15-P and 272 of the Lithographers and Photoengravers International Union, AFL-CIO (The Toledo Blade Company, Inc.)*, 175 NLRB 1072 (1969).

[20]*Id.*

functions. In all of those cases it could reasonably be inferred that the union's discipline was imposed *because of* the manner in which a supervisor had performed a collective-bargaining or grievance adjustment function, and was therefore properly proscribed. However, in a strike situation, what the supervisor does behind the picket line is, in the ordinary case, and most assuredly in this one, completely irrelevant. The union's interest is quite simply to preserve strike solidarity. It is specious to think that the union cares an iota whether its member (who seeks to retain the substantial benefit his union membership creates) is adjusting a grievance, operating a press, or engaged in any other activity while his fellow members man a picket line. It cares only that he is working during a strike.[21] It is even more specious to argue, as has the majority in this case and others,[22] that whatever the union's interest, it is reasonable to conclude that the supervisor will be affected in the future performance of his grievance adjustment or collective-bargaining duties. Can it seriously be argued that a supervisor who is disciplined for working during a lawful strike will relate that discipline to the manner in which he performed the particular function he was engaged in at the time the discipline was levied? Is not the only

[21]There may be rare cases where, in point of fact, the union's real interest is not the preservation of strike support but the discipline is couched in such terms. Those cases will of course ultimately depend on the substantiality of the facts tending to establish that the union was indeed posturing and, in fact, directing the discipline toward the performance of an 8(b)(1)(B) function (e.g. selecting only those supervisors who have adjusted grievances adverse to the union for disciplinary procedures).

[22]See, e.g., *Hammond Publishers, Inc.*, 216 NLRB No. 149 (1975).

reasonable conclusion the supervisor can draw the conclusion that he has been disciplined simply for working at all? In the future, when the supervisor represents the employer at the bargaining table, is it reasonable for the supervisor to fear subsequent discipline if he faithfully represents management's viewpoint because of his prior discipline for working during a strike?

The reasonable answers to these questions highlight the defects in the Board's position when it wrote the latest chapter in the history of Section 8(b)(1)(B), the cases involved in *Florida Power*. The Board's decisions in *Florida Power*,[23] *Illinois Bell*,[24] and *Wisconsin Electric*[25] represented the most profound departure from the limited scope accorded Section 8(b)(1)(B) in its early years, for they extended Section 8(b)(1)(B) to proscribe not only union discipline arising out of disputes arguably related to a grievance adjustment or collective-bargaining function, but also union discipline of supervisor-members who acted as strikebreakers; i.e., union members who crossed a lawful picket line to in part replace their fellow union members honoring the line. The discipline was violative, it was found, because the supervisors were working at the behest or in the interest of the employer and any other result would mean the

> . . . Employer could no longer count on the complete and undivided loyalty of those it had

[23]193 NLRB 30 (1971).

[24]192 NLRB 85 (1971).

[25]192 NLRB 77 (1971). The petition for certiorari in *Wisconsin Electric*, the companion case of *Illinois Bell*, was granted by the Supreme Court on June 24, 1974, the date of the Court's decision in *Florida Power*. Simultaneously, the judgment of the Seventh Circuit Court enforcing the Board's order was vacated and remanded with instruction to consider the case in light of the Supreme Court's decision in *Florida Power*. See 418 U.S. at 902.

selected to act as its collective-bargaining agents or to act for it in adjusting grievances.[26]

That refrain is echoed in the Administrative Law Judge's Decision adopted by the majority here:

> [T]he pressure extended by Respondent's actions on the Company's supervisor would tend to inhibit him and impair his effectiveness as a loyal supervisor in maintaining the Company's interests.

My reading of *Florida Power*, on the other hand, compels the conclusion that the "loyalty" an employer may demand from any supervisor is, *during a strike*, no greater than the loyalty that may be demanded by his union, at least for 8(b)(1)(B) purposes. As the Court stated:

> It is strenuously asserted, however, that to permit a union to discipline supervisor-members for performing rank-and-file work during an economic strike will deprive the employer of the full loyalty of those supervisors. Indeed, it is precisely that concern that is reflected in these and other recent decisions of the Board holding that the statutory language "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" is not confined to situations in which the union's *object* is to force a change in the identity of the employer's representatives, but may properly be read to encompass any situation in which the union's actions are likely to deprive the employer of the undivided loyalty of his supervisory employees. . . .
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> * * *

[26]192 NLRB at 78.

> *The concern expressed in this argument is a very real one, but the problem is one that Congress addressed, not through § 8(b)(1)(B), but through a completely different legislative route.*[27]

Similarly, when *Florida Power* is read against the backdrop of the history of Section 8(b)(1)(B), one would think my colleagues would at least consider the following statement:

> Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment. [Emphasis in original.][28]

My reading of *Florida Power* compels the further conclusion that the operative test in establishing a violation of Section 8(b)(1)(B) is whether it is reasonable to conclude that the union's discipline may adversely affect the disciplined supervisors' future performance of two distinct functions, grievance adjustment and collective-bargaining representation. The majority says it will because (a) the Board said so in *Hammond Publishers* and (b) the Board says so now.

In *Hammond Publishers*, the purported underpinning of the majority's analysis herein, a Board majority concluded that because the Supreme Court had "assum[ed] without deciding that *Oakland-Mailers'* fell within the outer limits of its test, the Supreme Court has implicitly recognized that an adverse carry-

[27]417 U.S. at 805-807 (emphasis supplied).
[28]*Id.* at 804.

over effect may result where the disciplined supervisor had been engaged in the activity of contract interpretation." This "recognition," the *Hammond* majority reasoned, led to the conclusion that when the supervisor engaged only in supervisory duties there was "clearly a violation" in the discipline because "it is reasonably likely that an adverse effect will carry over to the supervisor's performance of his 8(b)(1)(B) duties where he is disciplined after having engaged only in the performance of supervisory duties." The *Hammond* "rationale" reappears here:

> We believe that the adverse future effect which the Supreme Court referred to as violative in *Florida Power* is as likely to occur, regardless of a union's professed reasons or intent, if a supervisor-member is disciplined after having performed only his normal supervisory duties or if he is disciplined after having engaged in contract interpretation [citing *Oakland Mailers*]. In the latter case it is the supervisor's future manner of contract interpretation which is likely to be influenced and in the former case it is the supervisor's actual future performance of supervisory duties, including grievance adjustment or collective bargaining, which is likely to be influenced.

Several flaws come immediately to mind. First, the majority has engaged in a semantic gambit. The supervisors in *Oakland Mailers* were not disciplined, as the majority suggests, "*after* having engaged in contract interpretation" but rather "*for* allegedly assigning bargaining unit work in violation of the collective bargaining agreement."[29] But note the majority must

[29] *Id.* at 800. See also the Board's decision: "Specifically, Foreman Cox and Assistant Foremen Thompson and Fraser

use the word "after" to draw its alleged parallel with the instant case because Supervisor Flood was clearly *not* disciplined "*for* having engaged in supervisory duties." Secondly, the supervisors in *Florida Power* were also disciplined "after having engaged in supervisory duties." But what made the discipline in *Florida Power* not violative was the fact that the supervisors therein *were not disciplined for that reason* but rather because they had also performed bargaining unit work; they knew that to be the reason and with that knowledge there could be no argument that their performance of the specific 8(b)(1)(B) functions could reasonably be expected to be influenced. Third, an effect on one's performance of *supervisory* duties does not constitute a violation of Section 8(b)(1)(B), as I read *Florida Power*, if the effect is not also on one's performance of the specific functions of grievance adjustment or collective-bargaining representation.[30]

And so, having posed the critical issue, namely, whether an adverse effect is "reasonably likely" to result from the imposition of the discipline, the majority again responds affirmatively but without supporting reasons.

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were cited to appear before Respondent's executive committee which had the power to discipline union members. The citations involved certain alleged violations by the individuals of the collective-bargaining agreement . . . . There was, in addition, evidence of a number of threats made by Respondent's agents to Foreman Cox and Assistant Foreman Thompson and Bowlin. These threats also arose over disagreements involving contract interpretations or grievance adjustment. . . ." 172 NLRB 2173 (1968).

[30] Unless my colleagues are still of the view that *Florida Power* can further be dismissed as it affects our prior rule that all supervisors are necessarily within the ambit of Sec. 8(b)(1)(B). See, e.g., *Operating Engineers, Local No. 501 (Anheuser Busch, Inc.)*, 199 NLRB 551 (1972).

In *Oakland Mailers* it was "reasonably likely" because in the future the supervisor would again be engaged in the very same activity for which he was disciplined previously — that the supervisor might feel he could, so to speak, be burned twice comports with a general understanding of human nature. But when the supervisor fined for crossing a picket line is adjusting a grievance several weeks later he is *not* performing the same function for which he was previously fined because he was not fined for adjusting a grievance or anything related thereto. He was fined for crossing the picket line. The reasonable conclusion for the supervisor to draw is that if, once again in the future, he crosses a lawful picket line, he will, once again, be disciplined. The majority cannot be heard to argue that it will be difficult for the supervisor-member to ascribe the discipline to his crossing the line as opposed to his potential to adjust grievances or to represent the employer at the bargaining table. It is indeed "unlikely" and assuredly "unreasonable" for a supervisor, who is, as Supervisor Flood was herein, disciplined for "continu[ing] to work at The Daily Racing Form . . . even though a picket line of New York Typographical Union No. 6 has been posted at that site," to speculate that the manner in which he performed 8(b)(1)(B) functions lay at the root of his difficulty or that the manner in which he performs such functions in the future need be altered. Finally, for a variety of reasons, I do not believe a violation of Section 8(b)(1)(B) can be posted on the theory that to coerce the *supervisor* into siding with the union (or paying the penalty of loss of union benefits) constitutes an impermissible effect on the supervisor's future performance of grievance adjustment

or collective-bargaining functions because it deprives the employer of all the supervisor's services. First, while the dilemma faced by the supervisor is one to which I am sympathetic, it is a plain fact of life that the supervisor cannot reasonably expect to serve two masters without incurring obligations to both. In any event, as noted earlier, the supervisor's dilemma is not the focus of our inquiry because of the absence of statutory protections accorded him. Secondly, the employer's dilemma, namely, the possibility that the supervisor-member may opt to resolve the conflict of loyalty on the side of his union and thereby deprive the employer of his services, is, in the context of alternatives afforded the employer, a self-inflicted dilemma. Like the supervisor, the employer cannot reasonably expect that the benefits gained at the bargaining table resulting from its concession to allow supervisors to remain union members are benefits without a price.[81] Having been afforded the opportunity to refuse to hire union members as supervisors, the opportunity to discharge supervisors for involvement in union affairs, the opportunity to incorporate into a collective-bargaining agreement the permissible extent of a supervisor-member's functioning during a strike and, indeed, the opportunity to provide additional incentives making it worthwhile for all union members to forfeit union benefits upon taking supervisory positions, the employ-

[81]For example, in *Illinois Bell* the company agreed to drop its objections to the inclusion of certain foremen in the collective-bargaining agreement in return for a jurisdictional concession by the union. See Vol. II, p. 61, Appendix to the briefs before the Supreme Court in *Florida Power*. Furthermore, employers will often be the initiator of attempts to include supervisors in the contract's coverage and thereby not face the need to recompense would be supervisors for the substantial loss of benefits forced resignation from the union would otherwise necessitate.

er, having forsaken such opportunities, cannot now be heard to argue that the union is affecting its selection of the very grievance adjustment or collective-bargaining representative it permits to retain union membership.

Because the Board majority continues to ignore the fundamental questions posed by its "relatively straightforward" approach,[32] because the Board majority is, in my view, still wedded to preserving the remnants of its pre-*Florida Power* intrusion into the area of legitimate and substantial intraunion interests, and because I believe union discipline of *all* members for conduct related to and during a strike remains unregulated by Congress[33] and is both outside the line of cases commencing with *Oakland Mailers* and within the line of cases beginning with the Supreme Court's decision in *Allis-Chalmers*,[34] I reject the majority's purported analysis.

If, as the Court said in *Allis-Chalmers*, the union has a substantial interest in disciplining strikebreakers, that analysis ought not to be altered simply because they happen to be in supervisory positions. The thrust against the union as an institution and against its strike function is just as direct and effective.[35]

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[32]The language comes from the majority opinion in *Hammond*.

[33]But see fn. 11, *supra*.

[34]I know of no case not since overruled, and the majority cites none, wherein a violation of Sec. 8(b)(1)(B) has been found in a union's discipline of a supervisor for crossing a picket line.

[35]Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 Duke L.J. 1067, 1128-29.

APPENDIX E.

Chicago Typographical Union No. 16 and Hammond Publishers, Inc. Cases 13-CB-5060 and 13-CB-5157.

March 6, 1975

DECISION AND ORDER

By Members Fanning, Jenkins, Kennedy, and Penello

On July 10, 1974, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, the Charging Party and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a brief in answer to the exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge decided the instant case shortly after the Supreme Court's decision in *Florida Power & Light Co. v. I.B.E.W., Local 641*, 417 U.S. 790 (1974).[1] The Administrative Law Judge concluded, on the basis of *Florida Power*, that the Respondent had not violated Section 8(b)(1)(B) of the Act by disciplining two of its supervisor-members who worked behind Respondent's picket line during a lawful strike.[2] This conclusion was based on the

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[1]The Supreme Court held therein that a union did not violate Sec. 8(b)(1)(B) by disciplining supervisor-members who crossed lawful picket lines to perform rank-and-file struck work.

[2]Andress and Palmer, who were both found by the Administrative Law Judge to be 2(11) supervisors and 8(b)(1)(B)

(This footnote is continued on next page)

following findings.[3] The Administrative Law Judge found that the nature of the work performed[4] by Andress and Palmer during the work stoppage had not been a factor in Respondent's decision to discipline Andress and Palmer and that, on all the evidence, Respondent's only motivation in imposing the discipline was to "keep those it construed subject to its discipline from working during a work stoppage."[5]

representatives, were charged with and found guilty of "ratting" and thereafter fined by and expelled from the Respondent. The Administrative Law Judge concluded, from the credited testimony of one of Respondent's witnesses, that "ratting" concerned remaining at work in a struck office.

[3]These findings, while pertinent to the motivational rationale of the dissent, are of no moment under our analysis. We observe, however, as noted *infra*, that these findings are supported by the record.

[4]Andress, who was characterized by the Administrative Law Judge as "a frank, forthright, and candid witness," testified that his duties as production manager remained the same during the work stoppage as before, and that he did not perform any additional functions in the composing room during this time. He stated that between August 23, 1973, and September 10, 1973, he "put in 22 hours a day" and that during this time he performed at most 35 minutes per day of what might be contended to be composing room work such as going to the file room to get ads and putting some tapes through a reader. Andress stated that he stopped performing even these tasks on September 10, 1973, when Palmer returned to work. Palmer testified, and the Administrative Law Judge found, that he resumed his normal functions as the composing room foreman when he returned to work on September 10, 1973. Palmer testified that he performed several acts in the composing room upon returning to work which, prior to August 23, 1973, were normally performed by unit employees. In respect to these tasks the Administrative Law Judge stated: "The facts relating to his work thereafter reveal at most a minimal amount of work performed by Palmer which might be described as non-supervisory unit work."

[5]The dissent would have us believe, under its motivational type analysis of *Florida Power*, that the instant case falls "squarely within the Supreme Court's teaching" or that the instant case "is an exact copy of *Florida Power*." We believe, to the contrary,

We believe that the Administrative Law Judge has misinterpreted the Supreme Court's decision in erroneously finding that the Respondent had not violated Section 8(b)(1)(B) of the Act by disciplining Andress and Palmer. We do not read the Supreme Court's

that they had performed struck work during the strike. between the two cases. In the instant case, both the evidence and the Administrative Law Judge's conclusions establish that the Respondent's acts of discipline toward the supervisor-members herein were not the result of the alleged belief of Respondent that the supervisor-members were performing bargaining unit work. In fact, the Administrative Law Judge held, while discrediting any testimony to the contrary, that "I am persuaded that the totality of the evidence reveals that it made no difference to Respondent whether Andress or Palmer were engaged in bargaining unit work or supervisory work." In contrast to this situation of the instant case, it is apparent to us that the supervisor-members in both *Florida Power* and *Illinois Bell* were disciplined precisely because the unions therein believed that they had performed struck work work during the strike. That this is so seems apparent from the decisions of the Board. *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, IBEW (Illinois Bell Telephone Company)*, 192 NLRB 85 (1971); *International Brotherhood of Electrical Workers System Council U-4, et al. (Florida Power & Light Company)*, 193 NLRB 30 (1971) (wherein the Board treated the fines as having been imposed as a result of the supervisors' performance of struck work), the decision of the Circuit Court in *Illinois Bell*, 487 F.2d 1143 (C.A.D.C., 1973) (wherein the court observed "Section 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-and-file struck work"), the decision of the Supreme Court in *Florida Power & Light*, 417 U.S. 790 (1974) (wherein the Court observed "we hold that the respondent unions did not violate Section 8(b)(1)(B) of the Act when they disciplined their supervisor-members for performing rank and file struck work"), and the very words of our dissenting colleague, *infra*, that: "it is the performance of *rank-and-file* functions which gave rise to the issue in *Florida Power*," and also at fn. 19, *infra*, "It should. then, be clear that the performance of the work of the striking member, whether it be sole or partial was the heart of the matter." Given this crucial difference between the two cases, we do not perceive how, even under a motivational analysis, the actions of the Respondent herein can be sanctioned under *Florida Power*.

decision as turning on a determination of the motivation behind a union's act of discipline, but rather on a determination of the reasonable effect of that discipline on the supervisor's activities as an 8(b)(1)(B) representative.[6] As stated by the Supreme Court:

> The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8 (b)(1)(B) only *when that discipline may adversely affect the supervisor's conduct* in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. [Emphasis supplied.]

The further question of "when that discipline may adversely affect the supervisor's conduct . . ." clearly depends on an analysis of the activity engaged in by the supervisor during the period for which the discipline is imposed, rather than on an evaluation of the union's motivation. That this is so seems apparent from the Supreme Court's treatment in *Florida Power* of the Board's decision in *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB 2173 (1968). By assuming without deciding that *Oakland-Mailers'* fell within the outer limits of its test, the Supreme Court has implicitly recognized that an adverse

[6]This interpretation is but a recognition of the common law rule that a man is held to have intended the foreseeable consequences of his conduct. *The Radio Officers' Union of the Commercial Telegraphers Union, AFL [A. H. Bull Steamship Company] v. N.L.R.B.*, 347 U.S. 17 (1954).

carryover effect may result where the disciplined supervisor had been engaged in the activity of contract interpretation.[7]

The application of the effect test is relatively straightforward in extreme situations where the disciplined supervisor has engaged either *only* in the performance of supervisory activities (not limited to grievance adjustment or collective bargaining), or *only* in the performance of rank-and-file struck work.[8] In the former there is clearly a violation since it is reasonably likely

[7]We note that in discussing *Oakland Mailers'* the Supreme Court recognized that: "the Board had reasoned that the natural and foreseeable effect of such discipline was that in interpreting the agreement in the future, the supervisor would be reluctant to take a position adverse to that of the union."

[8]While there is some question whether or not any of the disciplined supervisors in the cases before the Supreme Court in *Florida Power* perform *only* rank-and-file struck work, we believe that the Supreme Court disregarded, for the purpose of its decision, the possibility that some of these supervisors may have performed some supervisory functions during the work stoppage. This follows, we feel, for at least two reasons. First, the decision makes no mention whatsoever that any of the supervisors performed any supervisory functions during any of the disputes. Rather, the decision speaks in terms of supervisors who crossed picket lines to engage in the performance of rank-and-file work. This suggests to us that the amount of supervisory work performed, if any at all, must have been very small and of minor significance in comparison to the unit work performed by the supervisors who were disciplined. Second, the Supreme Court characterized the disciplined supervisors in the cases before it as not being "engaged in collective bargaining or grievance adjustment, or *any activities related thereto, when they crossed* union picket lines during an economic strike *to engage in rank and file struck work.*" (Emphasis supplied.) This telling factual characterization by the Court does not fit the facts of the instant case. In the instant case, it appears clear to us that Andress and Palmer crossed the picket line to perform supervisory functions and only incidental thereto did they perform a minimal amount of what might arguably be called unit work. They did not, as revealed by the very nature of their activities, cross the picket line to engage in rank-and-file struck work.

that an adverse effect will carry over to the supervisor's performance of his 8(b)(1)(B) duties where he is disciplined after having engaged only in the performance of supervisory duties.[9] In the latter, there is no violation since it is not reasonably likely that an adverse effect will carry over where the supervisor has engaged in the performance of only rank-and-file struck work.[10]

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[9]This conclusion appears to be anticipated by both the majority and dissenting opinions in *Florida Power*. At fn. 22, the majority stated, in the course of discussing how the petitioners had exaggerated the dilemma of the supervisors' conflict of loyalties, that: "Those [Illinois Bell supervisors] who did work during the strike but performed only their regular duties were not disciplined by the union. In Florida Power . . . the union did not discipline those who did so [crossed the picket line] only to perform their normal supervisory functions." Mr. Justice White stated, at fn. 2 of the dissent, that: "I do not read the Court to say that §8(b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work, during a labor dispute."

We note with interest the position of the dissent which seems to suggest that there would be no violation of Sec. 8(b)(1)(B), regardless of the activity engaged in by the disciplined supervisor-member, unless the discipline is "directed to the manner in which he performs" his normal functions. It is not altogether clear from the dissent whether the phrase his "normal functions" encompasses the performance of all supervisory duties or only grievance adjustment or collective-bargaining duties. Despite this lack of clarity, it would seem that under the dissent there would be no violation even though the only activity engaged in by the disciplined supervisor-member was that of grievance adjustment or collective bargaining, as long as the union discipline was not directed at the "manner in which he performs those functions." We do not perceive the Supreme Court's opinion as so narrowly limiting Sec. 8(b)(1)(B) of the Act.

[10]As stated in *International Brotherhood of Electrical Workers, AFL-CIO (Illinois Bell) v. N.L.R.B.*, 487 F.2d 1143, 1157 (C.A.D.C., 1973):

> [W]hen a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline. . . . There is accordingly no reason to believe that by being forced to take sides with the union in a dispute unrelated to the performance of his supervisory functions, and to take sides only to the extent of withholding his labor from rank-and-file nonsupervisory work, a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties.

The instant case, in contrast to these extreme situations, presents a factual setting where the disciplined supervisors performed not only supervisory duties (including grievance adjusting) but also, at least arguably, a minimal amount of rank-and-file struck work during the work stoppage.[11] We believe that the Respondent's

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[11]While the Administrative Law Judge failed to conclude whether Andress or Palmer actually performed any rank-and-file struck work, the record itself reveals that they may have performed, at most, a minimal amount of this work during the work stoppage. See, fn. 4, *supra*. Our dissenting colleague questions the assertion that Andress and Palmer performed at most a minimal amount of rank-and-file work. In support of this skepticism the dissent cites the reduction of the work force from 110 before the work stoppage to 10 immediately after the work stoppage. An examination of Andress' testimony reveals that it is indeed probable that Andress and Palmer performed at most a minimal amount of what might be characterized as rank-and-file work. Andress testified that there were 10 other individuals, in addition to the publisher and himself, working in the composing room immediately following the work stoppage. Of these 10, 3 or 4 were from other departments and were experienced in computer work but not in composing room work. The remaining six to seven were experienced in composing room work by virtue of their employment with other papers owned by Hammond Publications, the parent corporation. Andress further testified that all of these workers worked from 20-22 hours per day. Andress also testified to the elimination of some procedures and the addition of other new procedures and some advanced equipment (some of the computer type) and the development of a newly designed composing room. Some functions were also performed in other areas of Hammond's facilities. On and after September 3, 1973, new employees, some with composing room experience, were

(This footnote is continued on next page)

acts of discipline in the instant case violated Section 8(b)(1)(B) notwithstanding the fact that Palmer and Andress may have performed a minimal amount of rank-and-file struck work. This follows, we feel, since under our view of *Florida Power* it makes no difference whether a supervisor performs a minimal amount of struck work because it is still reasonably likely that an adverse effect may carry over to the supervisor's performance of his 8(b)(1)(B) duties when he is disciplined after having performed substantially only supervisory functions and only a minimal amount of what might arguably be called rank-and-file struck work during a work stoppage.

We do not believe that this analysis conflicts in any way with the Supreme Court's treatment of the issue of a supervisor-member's conflict of loyalties. The Supreme Court stated that an employer may not permit a supervisor to become a union member and yet continue to be able to demand "absolute loyalty" from that supervisor. We interpret this to mean that an employer who permits his supervisors to become union members may no longer demand the loyalty of these supervisors if they cross a picket line and in effect, substitute their services for those of the rank-and-file employees. In this same regard, however, we do not believe that the Supreme Court's decision is so broad that it means that an employer surrenders his right to require the loyalty of these same supervisors when they cross a picket line and thereafter perform substantial supervisory functions, even though incidental

interviewed and hired by Andress. Thus, Andress testified that he hired 3 to 4 new employees on about September 3, 1973, and that by mid-December 1973, he had hired around 33 new employees (the original 10 went back to their other jobs).

thereto they also arguably perform a minimal amount of rank-and-file struck work.[12]

In sum, due to the fact that these supervisor-members crossed Respondent's picket line and thereafter performed substantially the same duties as they had done before the strike, which were principally or only supervisory functions (including grievance adjusters), we find that Respondent has violated Section 8(b)(1)(B) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board thereby orders that the Respondent, Chicago Typographical Union No. 16, Chicago, Illinois, its officers, agents, and representatives, shall:

1. Cease and desist from restraining or coercing Hammond Publishers, Inc., in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances:

(a) By fining, expelling, otherwise disciplining, or attempting by any means to collect or enforce any

[12]In the words of the majority of the circuit court in *International Brotherhood of Electrical Workers, AFL-CIO* [*Illinois Bell*] *v. N.L.R.B.*, 487 F.2d 1143, 1169-70 (C.A.D.C., 1973):

> If the employer, however, chooses not to exercise his rights under that section [14(a)], permits his supervisors to join unions . . . the employer cannot still insist on the supervisors' undivided loyalty in *every* union-employer dispute no matter how unrelated the subject of that dispute is to the supervisory function. . . .
>
> This is not to say, of course, that by permitting his supervisors to join unions the employer *completely* waives his right to their loyalty. Even if he permits them to join unions, Section 8(b)(1)(B), as interpreted by *Oakland Mailers* and *Meat Cutters*, immunizes them from union discipline imposed for the manner in which they perform their supervisory functions. [Emphasis supplied.]

following findings.[3] The Administrative Law Judge found that the nature of the work performed[4] by Andress and Palmer during the work stoppage had not been a factor in Respondent's decision to discipline Andress and Palmer and that, on all the evidence, Respondent's only motivation in imposing the discipline was to "keep those it construed subject to its discipline from working during a work stoppage."[5]

representatives, were charged with and found guilty of "ratting" and thereafter fined by and expelled from the Respondent. The Administrative Law Judge concluded, from the credited testimony of one of Respondent's witnesses, that "ratting" concerned remaining at work in a struck office.

[3]These findings, while pertinent to the motivational rationale of the dissent, are of no moment under our analysis. We observe, however, as noted *infra*, that these findings are supported by the record.

[4]Andress, who was characterized by the Administrative Law Judge as "a frank, forthright, and candid witness," testified that his duties as production manager remained the same during the work stoppage as before, and that he did not perform any additional functions in the composing room during this time. He stated that between August 23, 1973, and September 10, 1973, he "put in 22 hours a day" and that during this time he performed at most 35 minutes per day of what might be contended to be composing room work such as going to the file room to get ads and putting some tapes through a reader. Andress stated that he stopped performing even these tasks on September 10, 1973, when Palmer returned to work. Palmer testified, and the Administrative Law Judge found, that he resumed his normal functions as the composing room foreman when he returned to work on September 10, 1973. Palmer testified that he performed several acts in the composing room upon returning to work which, prior to August 23, 1973, were normally performed by unit employees. In respect to these tasks the Administrative Law Judge stated: "The facts relating to his work thereafter reveal at most a minimal amount of work performed by Palmer which might be described as non-supervisory unit work."

[5]The dissent would have us believe, under its motivational type analysis of *Florida Power*, that the instant case falls "squarely within the Supreme Court's teaching" or that the instant case "is an exact copy of *Florida Power*." We believe, to the contrary,

We believe that the Administrative Law Judge has misinterpreted the Supreme Court's decision in erroneously finding that the Respondent had not violated Section 8(b)(1)(B) of the Act by disciplining Andress and Palmer. We do not read the Supreme Court's

that they had performed struck work during the strike. between the two cases. In the instant case, both the evidence and the Administrative Law Judge's conclusions establish that the Respondent's acts of discipline toward the supervisor-members herein were not the result of the alleged belief of Respondent that the supervisor-members were performing bargaining unit work. In fact, the Administrative Law Judge held, while discrediting any testimony to the contrary, that "I am persuaded that the totality of the evidence reveals that it made no difference to Respondent whether Andress or Palmer were engaged in bargaining unit work or supervisory work." In contrast to this situation of the instant case, it is apparent to us that the supervisor-members in both *Florida Power* and *Illinois Bell* were disciplined precisely because the unions therein believed that they had performed struck work work during the strike. That this is so seems apparent from the decisions of the Board. *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, IBEW (Illinois Bell Telephone Company)*, 192 NLRB 85 (1971); *International Brotherhood of Electrical Workers System Council U-4, et al. (Florida Power & Light Company)*, 193 NLRB 30 (1971) (wherein the Board treated the fines as having been imposed as a result of the supervisors' performance of struck work), the decision of the Circuit Court in *Illinois Bell*, 487 F.2d 1143 (C.A.D.C., 1973) (wherein the court observed "Section 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-and-file struck work"), the decision of the Supreme Court in *Florida Power & Light*, 417 U.S. 790 (1974) (wherein the Court observed "we hold that the respondent unions did not violate Section 8(b)(1)(B) of the Act when they disciplined their supervisor-members for performing rank and file struck work"), and the very words of our dissenting colleague, *infra*, that: "it is the performance of *rank-and-file* functions which gave rise to the issue in *Florida Power*," and also at fn. 19, *infra*, "It should. then, be clear that the performance of the work of the striking member, whether it be sole or partial was the heart of the matter." Given this crucial difference between the two cases, we do not perceive how, even under a motivational analysis, the actions of the Respondent herein can be sanctioned under *Florida Power*.

decision as turning on a determination of the motivation behind a union's act of discipline, but rather on a determination of the reasonable effect of that discipline on the supervisor's activities as an 8(b)(1)(B) representative.[6] As stated by the Supreme Court:

> The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8 (b)(1)(B) only *when that discipline may adversely affect the supervisor's conduct* in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. [Emphasis supplied.]

The further question of "when that discipline may adversely affect the supervisor's conduct . . ." clearly depends on an analysis of the activity engaged in by the supervisor during the period for which the discipline is imposed, rather than on an evaluation of the union's motivation. That this is so seems apparent from the Supreme Court's treatment in *Florida Power* of the Board's decision in *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB 2173 (1968). By assuming without deciding that *Oakland-Mailers'* fell within the outer limits of its test, the Supreme Court has implicitly recognized that an adverse

[6]This interpretation is but a recognition of the common law rule that a man is held to have intended the foreseeable consequences of his conduct. *The Radio Officers' Union of the Commercial Telegraphers Union, AFL [A. H. Bull Steamship Company] v. N.L.R.B.*, 347 U.S. 17 (1954).

carryover effect may result where the disciplined supervisor had been engaged in the activity of contract interpretation.[7]

The application of the effect test is relatively straightforward in extreme situations where the disciplined supervisor has engaged either *only* in the performance of supervisory activities (not limited to grievance adjustment or collective bargaining), or *only* in the performance of rank-and-file struck work.[8] In the former there is clearly a violation since it is reasonably likely

[7]We note that in discussing *Oakland Mailers'* the Supreme Court recognized that: "the Board had reasoned that the natural and foreseeable effect of such discipline was that in interpreting the agreement in the future, the supervisor would be reluctant to take a position adverse to that of the union."

[8]While there is some question whether or not any of the disciplined supervisors in the cases before the Supreme Court in *Florida Power* perform *only* rank-and-file struck work, we believe that the Supreme Court disregarded, for the purpose of its decision, the possibility that some of these supervisors may have performed some supervisory functions during the work stoppage. This follows, we feel, for at least two reasons. First, the decision makes no mention whatsoever that any of the supervisors performed any supervisory functions during any of the disputes. Rather, the decision speaks in terms of supervisors who crossed picket lines to engage in the performance of rank-and-file work. This suggests to us that the amount of supervisory work performed, if any at all, must have been very small and of minor significance in comparison to the unit work performed by the supervisors who were disciplined. Second, the Supreme Court characterized the disciplined supervisors in the cases before it as not being "engaged in collective bargaining or grievance adjustment, or *any activities related thereto, when they crossed* union picket lines during an economic strike *to engage in rank and file struck work.*" (Emphasis supplied.) This telling factual characterization by the Court does not fit the facts of the instant case. In the instant case, it appears clear to us that Andress and Palmer crossed the picket line to perform supervisory functions and only incidental thereto did they perform a minimal amount of what might arguably be called unit work. They did not, as revealed by the very nature of their activities, cross the picket line to engage in rank-and-file struck work.

that an adverse effect will carry over to the supervisor's performance of his 8(b)(1)(B) duties where he is disciplined after having engaged only in the performance of supervisory duties.[9] In the latter, there is no violation since it is not reasonably likely that an adverse effect will carry over where the supervisor has engaged in the performance of only rank-and-file struck work.[10]

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[9]This conclusion appears to be anticipated by both the majority and dissenting opinions in *Florida Power*. At fn. 22, the majority stated, in the course of discussing how the petitioners had exaggerated the dilemma of the supervisors' conflict of loyalties, that: "Those [Illinois Bell supervisors] who did work during the strike but performed only their regular duties were not disciplined by the union. In Florida Power . . . the union did not discipline those who did so [crossed the picket line] only to perform their normal supervisory functions." Mr. Justice White stated, at fn. 2 of the dissent, that: "I do not read the Court to say that §8(b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work, during a labor dispute."

We note with interest the position of the dissent which seems to suggest that there would be no violation of Sec. 8(b)(1)(B), regardless of the activity engaged in by the disciplined supervisor-member, unless the discipline is "directed to the manner in which he performs" his normal functions. It is not altogether clear from the dissent whether the phrase his "normal functions" encompasses the performance of all supervisory duties or only grievance adjustment or collective-bargaining duties. Despite this lack of clarity, it would seem that under the dissent there would be no violation even though the only activity engaged in by the disciplined supervisor-member was that of grievance adjustment or collective bargaining, as long as the union discipline was not directed at the "manner in which he performs those functions." We do not perceive the Supreme Court's opinion as so narrowly limiting Sec. 8(b)(1)(B) of the Act.

[10]As stated in *International Brotherhood of Electrical Workers, AFL-CIO (Illinois Bell) v. N.L.R.B.*, 487 F.2d 1143, 1157 (C.A.D.C., 1973):

> [W]hen a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline. . . . There is accordingly no reason to believe that by being forced to take sides with the union in a dispute unrelated to the performance of his supervisory functions, and to take sides only to the extent of withholding his labor from rank-and-file nonsupervisory work, a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties.

The instant case, in contrast to these extreme situations, presents a factual setting where the disciplined supervisors performed not only supervisory duties (including grievance adjusting) but also, at least arguably, a minimal amount of rank-and-file struck work during the work stoppage.[11] We believe that the Respondent's

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[11]While the Administrative Law Judge failed to conclude whether Andress or Palmer actually performed any rank-and-file struck work, the record itself reveals that they may have performed, at most, a minimal amount of this work during the work stoppage. See, fn. 4, *supra*. Our dissenting colleague questions the assertion that Andress and Palmer performed at most a minimal amount of rank-and-file work. In support of this skepticism the dissent cites the reduction of the work force from 110 before the work stoppage to 10 immediately after the work stoppage. An examination of Andress' testimony reveals that it is indeed probable that Andress and Palmer performed at most a minimal amount of what might be characterized as rank-and-file work. Andress testified that there were 10 other individuals, in addition to the publisher and himself, working in the composing room immediately following the work stoppage. Of these 10, 3 or 4 were from other departments and were experienced in computer work but not in composing room work. The remaining six to seven were experienced in composing room work by virtue of their employment with other papers owned by Hammond Publications, the parent corporation. Andress further testified that all of these workers worked from 20-22 hours per day. Andress also testified to the elimination of some procedures and the addition of other new procedures and some advanced equipment (some of the computer type) and the development of a newly designed composing room. Some functions were also performed in other areas of Hammond's facilities. On and after September 3, 1973, new employees, some with composing room experience, were

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acts of discipline in the instant case violated Section 8(b)(1)(B) notwithstanding the fact that Palmer and Andress may have performed a minimal amount of rank-and-file struck work. This follows, we feel, since under our view of *Florida Power* it makes no difference whether a supervisor performs a minimal amount of struck work because it is still reasonably likely that an adverse effect may carry over to the supervisor's performance of his 8(b)(1)(B) duties when he is disciplined after having performed substantially only supervisory functions and only a minimal amount of what might arguably be called rank-and-file struck work during a work stoppage.

We do not believe that this analysis conflicts in any way with the Supreme Court's treatment of the issue of a supervisor-member's conflict of loyalties. The Supreme Court stated that an employer may not permit a supervisor to become a union member and yet continue to be able to demand "absolute loyalty" from that supervisor. We interpret this to mean that an employer who permits his supervisors to become union members may no longer demand the loyalty of these supervisors if they cross a picket line and in effect, substitute their services for those of the rank-and-file employees. In this same regard, however, we do not believe that the Supreme Court's decision is so broad that it means that an employer surrenders his right to require the loyalty of these same supervisors when they cross a picket line and thereafter perform substantial supervisory functions, even though incidental

interviewed and hired by Andress. Thus, Andress testified that he hired 3 to 4 new employees on about September 3, 1973, and that by mid-December 1973, he had hired around 33 new employees (the original 10 went back to their other jobs).

thereto they also arguably perform a minimal amount of rank-and-file struck work.[12]

In sum, due to the fact that these supervisor-members crossed Respondent's picket line and thereafter performed substantially the same duties as they had done before the strike, which were principally or only supervisory functions (including grievance adjusters), we find that Respondent has violated Section 8(b)(1)(B) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board thereby orders that the Respondent, Chicago Typographical Union No. 16, Chicago, Illinois, its officers, agents, and representatives, shall:

1. Cease and desist from restraining or coercing Hammond Publishers, Inc., in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances:

(a) By fining, expelling, otherwise disciplining, or attempting by any means to collect or enforce any

[12]In the words of the majority of the circuit court in *International Brotherhood of Electrical Workers, AFL-CIO* [*Illinois Bell*] *v. N.L.R.B.*, 487 F.2d 1143, 1169-70 (C.A.D.C., 1973):

> If the employer, however, chooses not to exercise his rights under that section [14(a)], permits his supervisors to join unions . . . the employer cannot still insist on the supervisors' undivided loyalty in *every* union-employer dispute no matter how unrelated the subject of that dispute is to the supervisory function. . . .
>
> This is not to say, of course, that by permitting his supervisors to join unions the employer *completely* waives his right to their loyalty. Even if he permits them to join unions, Section 8(b)(1)(B), as interpreted by *Oakland Mailers* and *Meat Cutters*, immunizes them from union discipline imposed for the manner in which they perform their supervisory functions. [Emphasis supplied.]

fine or discipline imposed against any such representative, including Norman E. Andress and Vernon M. Palmer, who performs substantially only supervisory functions for Hammond Publishers, Inc., while Respondent is engaged in a labor dispute with that employer.

(b) By engaging in any like or related conduct constituting such restraint or coercion.

2. Take the following affirmative actions which, we find, will effectuate the policies of the Act:

(a) Rescind and expunge all records of the fine and expulsion levied against Norman E. Andress on November 25, 1973, and against Vernon M. Palmer on December 30, 1973, after they had performed substantially only supervisory functions for Hammond Publishers, Inc., while Respondent was engaged in a labor dispute with that employer.

(b) Advise Norman E. Andress and Vernon M. Palmer in writing that the said fines and expulsions have been rescinded and that the records of such fines and expulsion have been expunged.

(c) Post at its business office and meeting hall copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reason-

[13]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

able steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director for Region 13 with signed copies of said notice for posting by Hammond Publishers, Inc., if willing, in places where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER FANNING, dissenting:

The facts of the case, the law as set out in the Supreme Court's decision in *Florida Power*,[14] and the force of reason have all, in turn, been denied their due by the majority. I, therefore, am compelled to dissent.

On August 23, 1972, the employees of the composing room at Hammond Publishers set up a picket line in response to certain changes in working conditions instituted by Hammond.

Immediately prior to the work stoppage, there were approximately 110 employees, all of whom were journeymen, employed in the composing room. Hammond had not hired an apprentice in some 6 years. All the 110 journeyman printers participated in the work stoppage. The following day, Hammond's production manager, Andress, an admitted supervisor with extensive top-level management duties, crossed the picket line and, literally, moved into the composing room. He was

[14]*Florida Power & Light Company v. International Brotherhood of Electrical Workers, Locals 641, 622, 759, 820 and 1263; N.L.R.B. v. International Brotherhood of Electrical Workers, AFL-CIO*, 417 U.S. 790 (1974).

joined by approximately 10 other employees, 7 of which Hammond had secured from various other companies within its organization. Of these latter employees, none were even apprentices at the trade. Approximately three had some composing room experience but not in the work over which Respondent has jurisdiction. The record does not detail its exact function, but an essential process in production is performed by the "505 photographic unit." Prior to August 23, only three employees were trained in its operation. Two of those employees were engaged in the work stoppage—the third was Andress. According to his own testimony, it took Andress 2 or 3 weeks of training given by the manufacturer to learn the operation of the 505 in addition to "several months" of concurrent textbook study. The mechanical operation of the machine is, according to Andress, quite simple and can be taught in a matter of moments; however, when problems arise with the machine more extensive knowledge is required.

As to the composing room itself, Andress testified that immediately upon commencement of the picketing:

> All windows were completely sealed; the doors were kept under lock; there was no exit in or out of the composing room unless it was okayed by me by getting in or out. There was also, as I said, all the windows were completely blanked over so there was no way of anyone seeing into the composing room what was going on at that particular time. . . . We had a guard at two areas.

These conditions existed at Hammond for the extent of Andress' stay in the composing room.[15] Andress

[15]With the exception that Hammond began, around September 3, to hire additional replacements. By the time of the hearing, the work stoppage was still in progress and Hammond had hired a total of 33 replacements for the 110 journeyman printers.

returned to his usual duties on September 10, 1974, when he was replaced by Palmer, the foreman of the composing room. Palmer had participated in the work stoppage from August 23 to September 9.

Both Andress and Palmer testified that while behind the picket line they performed work which normally would have been performed by rank-and-file employees had there not been a strike, i.e., Andress and Palmer, by their own words, admitted performing struck work, albeit they characterized the extent of struck work performed as "minimal."

Although Hammond had sealed off the composing room, various reports from maintenance men and guards filtered down to the Respondent that Andress and Palmer were performing the work of the striking employees. Thus, on four occasions the Respondent was advised that Andress was "running the machine," "working the 505," and "putting tapes on the machine." On at least eight occasions the Respondent was informed that Palmer was doing the work of the striking employees.

Throughout the August 23—September 9 period that Andress worked in the composing room, he had voluntarily maintained his union membership in the face of high-level management responsibilities, so that he would not lose the insurance and mortuary benefits he had accrued while working at the trade. Palmer, as foreman of the composing room, was required to be a union member under the collective-bargaining agreement.[16] Ultimately, both were informed that

[16]Immediately prior to crossing the picket line, Palmer attempted to resign from Respondent. The question of the legality

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charges were being brought against them for "ratting." Neither Andress nor Palmer attended his hearing on the charges. Both trial committees were told that both had, according to reports, performed the work of employees engaged in the work stoppage. The record further establishes that both trial committees had expressed concern with the hearsay nature of the charge that Andress and Palmer had performed struck work, but, given their failure to appear, coupled with the secrecy with which their actions were undertaken, little choice remained but to recommend guilty verdicts. Both Andress and Palmer were notified that any defenses they might have offered to the trial committees would not be deemed waived upon their attendance at the union meeting which would consider the trial committees' recommendations. Both Andress and Palmer failed to appear. They were offered the opportunity to appeal. Both Andress and Palmer did not appeal.[17] Both Andress and Palmer were fined $1,000 and expelled from Respondent.

On these facts, the majority finds that Hammond was restrained or coerced in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

This case, in my view, is controlled by *Florida Power*. Because of certain statements made by the

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of disciplining a member who has attempted to resign from the Union is not in issue in this case. It was neither charged, nor litigated, and, in the words of counsel for the General Counsel. "I want to make it crystal clear this is not General Counsel's theory. General Counsel's theory is the Illinois Bell theory."

[17]Palmer, in fact, had refused to sign for the certified mail delivered to him notifying him of the trial committee meeting.

majority, it is necessary to clarify what that case (and its companion case, *N.L.R.B. v. International Brotherhood of Electrical Workers, and Local 134, IBEW (Illinois Bell Telephone Company)*, 487 F.2d 1143), involved. The complaint in *Florida Power* charged the respondent unions with violation of Section 8(b)(1)(B) because the unions fined certain supervisors who *"continued* working for Florida Power and crossed Respondent's picket lines as required in order to do so" (emphasis supplied). The case came to the Board on stipulated facts. The stipulation indicated that the fined supervisors "performed bargaining unit work." There was no indication that the supervisors performed "only" bargaining unit work. In point of fact, the Board's original decision in *Florida Power* stated that "the Company's supervisors routinely crossed the picket line during the course of the strike and *performed work, including unit work for the company.*"[18]

In the companion *Illinois Bell* case, the supervisors, according to the General Counsel's complaint, "worked *and/or supervised* the performance of work on behalf of the Employer" (emphasis supplied). A hearing was conducted in the case during which all parties stipulated that the fined supervisors "during the same period performed work of a supervisory nature." At least one fined supervisor testified that besides performing rank-and-file work, "I acted in the capacity of a supervisor to other people who were performing work during the strike."

As a point of logic and given the clear, irrefutable facts of both *Florida Power* and *Illinois Bell*, I am at a loss to understand the majority's "doubt" as to

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[18]193 NLRB 30 (1971). (Emphasis supplied.)

whether the supervisors involved performed "only" rank-and-file work. They clearly did not.

What is true about *Florida Power* is that we know neither the extent of the supervisory functions engaged in by the supervisors involved nor the extent of the rank-and-file work they performed, but that lack of knowledge is merely the result of its irrelevance because it was the performance of rank-and-file functions which gave rise to the issue in *Florida Power*.[19] It should be apparent, then, that the Board may, in fact, be deciding a case which is an exact copy of *Florida Power* as it relates to the proportion of rank and-file versus supervisory functions engaged in by some supervisors disciplined therein and yet, anomalously, reaching an opposite result.[20]

Once it is understood that the supervisors in *Florida Power*, beyond a suggestion of doubt, performed rank-and-file struck work *and* continued in part to perform their supervisory functions behind the picket line, this case falls squarely within the Supreme Court's teaching because the supervisors involved herein were similarly engaged. It is not "arguable" that they performed rank-

[19]In addressing the so-called dilemma faced by the supervisor-member, the Court did point out that those supervisors who performed *only* their regular duties or normal supervisory functions were not disciplined by the union. 417 U.S. at 812, fn. 22. It should, then, be clear that the performance of the work of the striking member, whether it be sole or partial, was the heart of the matter.

[20]The majority is apparently confusing those cases in which the Court issues decisions arguably *broader* than the facts before it with its novel theory that the Court has, indeed is empowered, to issue a decision *narrower* than the facts before it. If the Court could do the latter, it would be, in effect, not deciding the case at all and, as in this case, causing relitigation of the precisely same issues.

and-file work, they *admitted* doing it,[21] and like the supervisors in *Florida Power* were disciplined for "working during the strike."[22]

[21]What is "arguable" is the credibility of the assertion that the extent of the performance of rank-and-file work was "minimal." Why would the Company seal off, completely, the composing room on the first day of the stoppage? Why is it credible to conclude that Hammond's operations could continue at normal output with the performance of but "minimal" rank-and-file work by Andress or Palmer when 110 journeyman printers are engaged in a work stoppage and are replaced with 10 employees, not even apprentices at the trade, only three of whom have any experience? How, during a work stoppage, is the Union supposed to determine whether struck work is actually being performed, let alone gauge the percentage of struck work? What constitutes "minimal" struck work? The Union in this case had clear reason to presume that the only truly experienced workers in the composing room, Andress and Palmer, were performing its members' work, as numerous reports indicated. The majority opinion, in effect, condones failure to appear at the disciplinary hearing as a means of avoiding any legally sufficient justification for the reasonable conclusion that the supervisors have, in fact, performed struck work.

[22]Although the issue posed in *Florida Power* was whether the respondents therein violated Sec. 8(b)(1)(B) by disciplining those supervisors who performed struck rank-and-file work, it is noted that the supervisors involved were actually notified that the reason for the union's discipline was their "continuing to work during the strike," as the record in that case clearly demonstrates. When those supervisors who worked during the strike took the time to appear before the executive board considering the discipline and testified that although they had worked during the strike they had not performed the work of union members, the respondent therein decided to drop charges. Of course, we do not know whether the same result would have been reached in the instant case because Andress and Palmer did not attend their hearings, but the actual language used to notify them of the reason for the Respondent's attempted inquiry should not lead my colleagues to conclude anything more than that such a fact is further indication of the substantial resemblance of the instant case to the cases involved in *Florida Power*. Counsel for the General Counsel's statement at fn. 16, *supra*, is most interesting on this point given the fact that *Illinois Bell* was ultimately to be overruled.

Even were we to assume that all supervisors in *Florida Power* performed more than "minimal" struck work (an assumption that simply cannot be founded on facts), I still would not accept the majority's conclusion that the performance of "minimal" struck work by supervisors is not a legitimate concern of the union and that its discipline of the supervisors for performance of such work is prohibited by Section 8(b)(1)(B). Again, my colleagues emphasize the supervisory tasks engaged in by those disciplined and not the rank-and-file functions they performed during the strike. It is also clear that, on the facts of this case, it was the performance by the supervisors of the work of its members which gave rise to the Union's attempted inquiry and consequent discipline.[23]

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[23]The Administrative Law Judge concluded that Respondent was motivated against Andress and Palmer because "they worked during the strike." While that may, in fact, be the case, I see no reason why such a conclusion compels a different result. In any event, it is clear to me that Andress' and Palmer's performance of the work of Respondent's members led directly to the initiation of disciplinary proceedings. That fact is substantiated by the numerous instances in the record demonstrating that Respondent's members were upset with Andress' and Palmer's performance of "union" work. Hunt's testimony, upon which the Administrative Law Judge relied, is additional evidence of that view. The Administrative Law Judge discredited testimony which might be "construed as being that the motivation against Andress and Palmer was *pinpointed* to the fact" that they had engaged in rank-and-file work, but it should be obvious that the Administrative Law Judge's interpretation of *Florida Power* did not require an inquiry into whether the Respondent was motivated against these supervisors because they merely "worked" or "performed unit work" but rather only whether the Respondent was motivated against them in an attempt to influence their particular grievance adjustment or collective-bargaining functions. In that sense, the Administrative Law Judge's finding is in the realm of *arguendo*. Whatever the Union's motivation, the fact remains that these supervisors were fined by their Union "for continuing to work" for their Employer and they performed rank-and-file work. The same is true of the supervisors in *Florida Power*.

There can be no relevance to the proportion of rank-and-file to supervisory functions performed by a supervisor during a strike when the question of equity, a basic thrust of the Supreme Court's decision, is considered. Whether supervisors perform 80 percent, 30 percent, or 10 percent rank-and-file work, their actions are equally antithetical to the interests of the union whose membership benefits they simultaneously enjoy. Even apart from the monumental burden the majority imposes upon a union's capacity to protect its substantial interest in strike solidarity by requiring it to overcome the naked assertion of "minimal" rank-and-file activity (as opposed to requiring the General Counsel to overcome the *prima facie* validity of the discipline where rank-and-file activity has been performed), I would dismiss the complaint herein on the basis of *Florida Power*.[24]

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[24]Because these supervisors admittedly performed rank-and-file struck work, I need not consider the validity of the majority's conclusion that a supervisor engaged solely in supervisory duties cannot be disciplined for working during a strike. While recognizing that such a factual setting is one left open by the Supreme Court in *Florida Power*, I do note that many of the considerations which went into the Court's decision are equally pertinent in such a fact pattern, and that the principle of law to be applied remains, in the Court's words, "that a union's discipline of one of its members who is a supervisory employee can constitute a violation of 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer."

I further note that to the extent a fine, threat of fine or expulsion, the union's bylaws setting forth the membership obligation to observe picket lines, or a picket line itself, may operate to restrain a supervisor-member from reporting to work during the strike to perform his normal functions, such restraint cannot be said to be directed to the manner in which he performs those functions. Although it is true that the restraint

(This footnote is continued on next page)

[The Appendix to the Board's Order and the Decision of the Administrative Law Judge have been omitted.]

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may well deprive the employer of the services of the supervisor during the strike if the supervisor resolves the problem of conflicting loyalties by observance of the picket line, this would seem to be a problem "Congress addressed, not through 8(b)(1)(B), but through a completely different legislative route." See my dissent in *Daily Racing Form, a Subsidiary of Triangle Publications, Inc.*, 216 NLRB No. 147 (1975).